MIRANDA V. ARIZONA
384 U.S. 436 (1966)

TABLE OF CONTENTS

PETITIONER'S BRIEF.....2-63
RESPONDENT'S BRIEF.....64-102
AMICUS BRIEF OF NEW YORK, ET AL......103-167

Record not
available.

Office-Supreme Court, U.S.
FILED
JAN 19 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
900 Title & Trust Building
Phoenix, Arizona 85003
Attorneys for Petitioner

INDEX

SUBJECT INDEX

BRIEF FOR PETITIONER

	Page
Opinion	1
Jurisdiction	1
Constitutional Provisions Involved	2
Question Presented	2
Statement	3
A. Proceedings on Interrogation and Trial	3
B. Proceedings in the Arizona Supreme Court	5
Summary of Argument	6
Argument	10
I. There Is a Right to Counsel for Arrested Persons When Interrogated by the Police	11
A. Federal Experience	12
B. The Constitutional Principles Applied to State Criminal Proceedings; the Development to *Escobedo*	15
(a) The *Powell* period (1932-1942)	16
(b) The *Betts* period (1942-1963)	19
(c) The *Gideon* period (1963-)	27
C. *Escobedo* and the Present Day	28
D. The Right to Counsel at Interrogation: 1966	33

Page

II. Practical Considerations of Law Enforcement Accord With Giving the Sixth Amendment Its Full Meaning 35

A. Cost Factors 38

B. The Effect on Law Enforcement 39

Conclusion 49

Appendix 51

Table of Cases and Authorities Cited

CASES:

Betts v. *Brady*, 316 U.S. 455, 62 Sup.Ct. 1252, 86 L.Ed. 1595 (1942) 7, 16, 19, 25, 26, 27

Brown v. *Mississippi*, 297 U.S. 278, 56 Sup.Ct. 461, 80 L.Ed. 682 (1936) 7, 17, 18, 25

Carnley v. *Cochran*, 369 U.S. 506, 82 Sup.Ct. 884, 8 L.Ed.2d 70 (1962) 8, 32, 34

Chambers v. *Florida*, 309 U.S. 227, 60 Sup.Ct. 472, 84 L.Ed. 716 (1940) 7, 17-18, 36, 37, 38

Chandler v. *Fretag*, 348 U.S. 3, 75 Sup.Ct. 1, 99 L.Ed. 4 (1954) 26

Cicenia v. *La Gay*, 357 U.S. 504, 78 Sup.Ct. 1297, 2 L.Ed.2d 1523 (1958) 7, 23, 24, 25, 28, 29, 34

Collins v. *Beto*, 348 F.2d 823 (5th Cir. 1965) 8, 33

Commonwealth v. *Negri*, 213 A.2d 670 (Pa. 1965) 8, 33

Culombe v. *Connecticut*, 367 U.S. 568, 81 Sup.Ct. 1860, 6 L.Ed.2d 1037 (1961) 8, 25, 34

Crooker v. *California*, 357 U.S. 433, 78 Sup.Ct. 1287, 2 L.Ed.2d 1448 (1958) 7, 10, 23, 24, 25, 28, 29, 34

Doughty v. *Maxwell*, 376 U.S. 202, 84 Sup.Ct. 702, 11 L.Ed.2d 650 (1964) 32

Escobedo v. *Illinois*, 378 U.S. 478, 84 Sup.Ct. 1758, 12 L.Ed.2d 977 (1964) 6, 7, 8, 15, 28, 29, 30, 31, 32, 33, 34, 36, 39

Page

Gideon v. *Wainwright*, 372 U.S. 335, 83 Sup.Ct. 792, 9 L.Ed.2d 799 (1963) 7, 16, 20, 27, 28, 32, 34

In re Groban's Petition, 352 U.S. 330, 77 Sup.Ct. 510, 1 L.Ed.2d 376 (1957) 7, 21, 22, 24, 28, 29, 34

Haley v. *Ohio*, 332 U.S. 596, 68 Sup.Ct. 302, 92 L.Ed. 224 (1948) 7, 20, 21

Hamilton v. *Alabama*, 368 U.S. 52, 82 Sup.Ct. 157, 7 L.Ed.2d 114 (1961) 7, 26, 27, 28, 33

Haynes v. *Washington*, 373 U.S. 503, 83 Sup.Ct. 1336, 10 L.Ed.2d 513 (1963) 27

Hebert v. *Louisiana*, 272 U.S. 312, 47 Sup.Ct. 103, 71 L.Ed. 270 (1926) 16

Jackson v. *United States*, 337 F.2d 136 (D.C.Cir. 1964) 33

Johnson v. *Zerbst*, 304 U.S. 458, 58 Sup.Ct. 1019, 82 L.Ed. 1461 (1938) 6, 12, 13, 19, 27, 28, 34

Latham v. *Crouse*, 338 F.2d 658 (10th Cir. 1964) 33

Lisenba v. *California*, 314 U.S. 219, 62 Sup.Ct. 280, 86 L.Ed. 166 (1941) 18, 19

McNabb v. *United States*, 318 U.S. 332, 63 Sup. Ct. 608, 87 L.Ed. 219 (1943) 13, 14, 26, 34, 43

McNeal v. *Culver*, 365 U.S. 109, 81 Sup.Ct. 413, 5 L.Ed.2d 445 (1961) 25

Mallory v. *United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L.Ed.2d 1479 (1957) 6, 14, 15, 17, 34, 40, 41, 43, 44, 47

Malloy v. *Hogan*, 378 U.S. 1, 84 Sup.Ct. 1489, 12 L.Ed.2d 653 (1964) 7, 29, 34

Massiah v. *United States*, 377 U.S. 201, 84 Sup. Ct. 1199, 12 L.Ed.2d 246 (1964) 29, 30, 36

Mefford v. *States*, 235 Md. 497, 201 A.2d 824 (1964) 33

Page

Miller v. *Warden, Maryland Penitentiary*, 338 F.2d 201 (4th Cir. 1964) 30

Oregon v. *Neely*, 239 Ore. 487, 398 P.2d 482 (1965) 35

People v. *Donovan*, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) 29

People v. *Dorado*, 42 Cal.Rptr. 169, 398 P.2d 361 (1965) 8, 30, 31, 32

People v. *Garner*, 57 Cal.2d 135, 18 Cal.Rptr. 40, 367 P.2d 680 (1961) 31

People v. *Gunner*, 15 N.Y.2d 226, 257 N.Y.S.2d 924, 205 N.E.2d 852 (1965) 33

Powell v. *Alabama*, 287 U.S. 45, 53 Sup.Ct. 55, 77 L.Ed. 158 (1932) 6, 9, 11, 12, 15, 16, 17, 18, 19, 24, 27, 35, 36, 37, 49

Prescoe v. *State*, 231 Md. 486, 191 A.2d 226 (1963) 34

Reck v. *Pate*, 367 U.S. 433, 81 Sup.Ct. 1541, 6 L.Ed.2d 948 (1961) 25

Spano v. *New York*, 360 U.S. 315, 79 Sup.Ct. 1202, 3 L.Ed.2d 1265 (1959) 10, 25

State v. *Miranda*, 98 Ariz. 11, 401 P.2d 716 (1965) 4

State v. *Miranda*, 98 Ariz. 18, 401 P.2d 721 (1965) 1, 4, 12, 17, 37, 49

Upshaw v. *United States*, 335 U.S. 410, 69 Sup. Ct. 170, 93 L.Ed. 100 (1948) 14

United States v. *Carignan*, 342 U.S. 36, 72 Sup. Ct. 97, 96 L.Ed. 48 (1951) 45

United States v. *Mitchell*, 322 U.S. 65, 64 Sup.Ct. 896, 88 L.Ed. 1140 (1944) 14

United States v. *Ogilvie*, 334 F.2d 837 (7th Cir. 1964) 33

Page

United States v. *Richmond*, 197 F.Supp. 125 (D. Conn. 1960) 9, 47, 48
United States ex rel. Russo v. *New Jersey*, 351 F.2d 429 (3d Cir. 1965) 8, 32-33
Watts v. *Indiana*, 338 U.S. 49, 69 Sup.Ct. 1347, 93 L.Ed. 1801 (1949) 36, 39
White v. *Maryland*, 373 U.S. 59, 83 Sup.Ct. 1050, 10 L.Ed.2d 193 (1963) 27, 28
Wright v. *Dickson*, 336 F.2d 878 (9th Cir. 1964) 8, 32

STATUTES:

U.S.C., Const. Amend. VI 2, 9, 11, 12, 13, 19, 27, 33, 34, 35
U.S.C., Const. Amend. XIV 2, 9, 33
18 U.S.C. Sec. 3006A 6, 42, 43
28 U.S.C. Sec. 1257(3) 2

OTHER:

American Civil Liberties Union, "Secret Detention by the Chicago Police." (Free Press, Glencoe, Ill., 1959) 44
Birzon, Kasanof and Forma, *The Right to Counsel*, 14 Buff. L.Rev. 428 (1965) 38
Rep. Emanuel Celler, *Federal Legis. Proposals*, 45 Minn. L.Rev. 697 (1961) 38
Comment, 53 Calif. L.Rev. 337 (1965) 33, 45
Comment, 32 U. Chi. L.Rev. 560 (1965) 33, 38
Comment, 52 Geo. L.J. 825 (1964) 33
Comment, 25 Md. L.Rev. 165 (1965) 33
Comment, *An Historical Argument* [*etc.*], 73 Yale L.J. 1000 (1964) 11

Page

Douglas, *The Right to Counsel,* 45 Minn. L. Rev. 693 (1961) 30
Dowling, *Escobedo and Beyond,* 56 J. Crim. Law 143 (1965) 33, 39
Enker and Elsen, *Counsel for the Suspect,* 49 Minn. L.Rev. 47 (1965) 39
FBI Law Enforcement Bull., Sept., 1952 38
Hearing before Senate Committee on the Judiciary on S. 1057 (1963) 43
Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation (1962) 9, 43-44, 45
Hearings on the Constitutional Aspects of Police Detention Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958) 40-41
Hearings on H.R. 5688 and 5.1526 Before the Senate Committee on the District of Columbia, 89th Cong., 1st Sess., pts. 1-2 (1965) 40, 41
H.R. Rep. No. 176, 89th Cong., 1st Sess. (1965) 40, 41

New York Times:

Nov. 20, 1965 41
Nov. 22, 1965 42
Dec. 2, 1965 42
Dec. 7, 1965 42

Note, U. Ill. L.F. 645 (1962) 38
Note, *The Right to Counsel During Police Interrogation,* 25 Md. L.Rev. 165 (1965) 33
Plucknett, *A Concise History of the Common Law,* 385 11

Page

Pollock, *Equal Justice in Practice*, 45 Minn. L. Rev. 737 (1961) 38

Restrictions in the Law of Interrogations and Confessions, 52 Nw. U. L.Rev. 77 (1957) 39

Sutherland, *Crime and Confession*, 79 Harv. L.Rev. 21 (1965) 46, 47

Weisberg, "Police Interrogation of Arrested Persons," *Police Power and Individual Freedom* (Sowle Ed. 1962) 39, 45

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

Opinion

This is a certiorari to the Supreme Court of Arizona, to review a decision reported at 98 Ariz. 18, 401 P. 2d 721, and reprinted R. 72.

Jurisdiction

Certiorari has been granted to review a judgment of the Supreme Court of Arizona in a criminal case, entered on April 22, 1965, which became final on May 7, 1965. The petition for writ of certiorari, filed in July of 1965, was granted on November 22, 1965, and the case, in forma pauperis, was placed on the appellate docket and summary

calendar. The issue is whether the conviction of petitioner violates his constitutional rights under the Sixth and Fourteenth Amendments to the Federal Constitution. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

Constitutional Provisions Involved

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S.C. Const. Amend. VI.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C. Const. Amend. XIV, Sec. 1.)

Question Presented

Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be

admitted into evidence over specific objection based on the absence of counsel?

Statement

A. Proceedings on Interrogation and Trial.

Petitioner was charged with having kidnapped and raped an eighteen year old girl in the vicinity of Phoenix, Arizona, on March 3, 1963.

A psychiatric report, made by a court-appointed psychiatrist (R. 6-9), gives the background of petitioner. Miranda, an indigent, was 23 years old at the time of the interrogation, and working as a truck driver and warehouseman. He had completed eighth grade and started on ninth grade before dropping out of school. Petitioner has a considerable sexual preoccupation, as illustrated in his interpretation of certain proverbs;[1] he has been involved in a series of sex offenses. The doctor concluded that petitioner "has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type" (R. 9).

Petitioner was, at the time of his apprehension, suspected of another, wholly unrelated crime. That incident, the robbery of a woman, may also have involved a threat of rape. The robbery occurred several months before the instant episode (R. 6-7). On March 13, 1963, defendant was arrested at his home and taken in custody to the police station where he was put in a lineup consisting of four per-

---

[1] "A rolling stone gathers no moss" is interpreted by Miranda to mean "if you don't have sex with a woman, she can't get pregnant." The proverb "people in glass houses shouldn't throw stones" is interpreted by Miranda to mean, "a person with one woman shouldn't go to another woman." Apart from this preoccupation, petitioner also believes that "a stitch in time saves nine" means "if you try to shut something in, you keep it from going out" (R. 8-9).

sons.[2] He was there confronted and identified by the two complaining witnesses, the one for robbery and the other for rape. Miranda was then taken to Interrogation Room 2 at the local police headquarters (R. 37) and there interrogated on both matters.

The two matters were at first consolidated in the trial court, with one sanity examination covering both, but were later separated for trial. (See report in 401 P. 2d at 718.) The petitioner was convicted of both offenses in separate trials. The two cases were treated by the Supreme Court of Arizona as companions; *State* v. *Miranda,* 98 Ariz. 11, 401 P. 2d 716 (not this case) and 98 Ariz. 18, 401 P. 2d 721 (this case), both decided on April 22, 1965.

Only the kidnapping-rape case has been brought here. However, since the interrogation was joint, some reference needs to be made to the other record, and, with the consent of opposing counsel, an extract has been tendered to this Court. It is reprinted as an appendix to this brief and is the basis of this paragraph. After the lineup, it was Officer Cooley, who had arrested Miranda, who took petitioner to Interrogation Room 2. There he and Officer Young conducted the questioning. Officer Young did not tell Miranda that anything he said would be held against him, nor did he tell Miranda of his right to consult an attorney (Appendix, reproduction of Transcript, p. 48). Officer Young believes that Miranda was told that he need not answer their questions (Appendix, reproduction of Transcript, p. 60) but no mention was made of the right to counsel.

---

[2] See R. 37, 38 where police officers refer variously to custody and arrest. Under Arizona law, custody is arrest; see Rule 14, Arizona Rules of Criminal Procedure, Vol. 17, Ariz. Rev. Stat. p. 175; and Ariz. Rev. Stat. Sec. 13-1401.

The absence of advice to petitioner regarding his right to counsel is amplified by the record in the instant case. Here, Officer Cooley also testified as to interrogation in Room 2 of the Detective Bureau (R. 37), and narrated extensively a confession he attributed to the petitioner (R. 38-40). A written statement,[3] obtained from Miranda while he was under the interrogation in Room 2, was then put into evidence (R. 40, R. 69). Officer Young confirmed that defendant was not told of any right to advice of counsel (R. 45). When the confession was offered into evidence, defense counsel expressly objected "because the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest." The confession was admitted over this objection (R. 41). In summation, the prosecutor emphasized to the jury the officer's testimony as to the interrogation, and the written confession (R. 50-51).

The two cases, the robbery and the rape-kidnapping, were tried by this same judge. In the instant case Miranda was given a sentence of twenty to thirty years, and in the robbery case he was given a sentence of twenty to twenty-five years. He thus faces imprisonment of forty to fifty-five years.

B. Proceedings in the Arizona Supreme Court.

The Arizona Supreme Court, setting forth the language of both the oral and the written confessions at length (R.

---

[3] The written confession says, "I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about ½ (half) inch in." It strains credulity to the breaking point to believe that this sentence was the product of a man of petitioner's mentality and comprehension as indicated by his answers to the questions set forth in footnote 1.

79-82), considered the admissibility of the confessions under the decisions of this Court. It held that *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) was "a controlling precedent" only where five elements occur, one of which is that "The suspect must have requested and been denied the opportunity to consult with his lawyer" (R. 87). This element being absent, the court held that:

> "[N]otwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence" (R. 93).

Accordingly, Miranda's conviction was affirmed.

Summary of Argument

There is a right to counsel for arrested persons when interrogated by the police. The law has been growing in this direction for more than thirty years. The federal experience from *Johnson* v. *Zerbst*, 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938) through the series of cases culminating in *Mallory* v. *United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957), and the Public Defender Act of 1964 (78 Stat. 552, 18 U.S.C. Sec. 3006A), and applying Federal Criminal Rules 5 and 44, amount to a requirement that all defendants be informed of their right to counsel and be given counsel swiftly upon their arrest. In the states, *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932) asserted as a constitutional requirement of state procedure that a person charged with a capital crime have "the guiding hand of counsel at every step in the proceedings against him." 287 U.S. at 69. This

requirement was buttressed by repeated decisions of this Court that it would accept no forced confessions, *Brown* v. *Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), or those obtained in such circumstances that the exclusion of "friends, advisers, or counselors" made it highly likely that force was used, *Chambers* v. *Florida*, 309 U.S. 227, 238, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

The right to counsel remained in some suspense during the period governed by *Betts* v. *Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942), but during the years following *Betts*, the views were rapidly developed by just short of a majority of this Court that secret confessions obtained without counsel between arrest and arraignment were invalid; *Haley* v. *Ohio*, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948); *In re Groban's Petition*, 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957). This view had the support of four Justices of the present Court in *Crooker* v. *California*, 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958); *Cicenia* v. *La Gay*, 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958).

When the right to counsel was recognized at the arraignment period, *Hamilton* v. *Alabama*, 368 U.S. 52, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961), and for all crimes at trial, *Gideon* v. *Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963), and when it was recognized that the privilege against self-incrimination applied to the states as well as the federal government, *Malloy* v. *Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), any view that counsel was not required for interrogation became untenable. Hence counsel was required for interrogation at least where requested in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964); and the fact that a request

happens to have been made at that particular case cannot be controlling for *Carnley* v. *Cochran*, 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962) held that the right to be furnished counsel does not depend upon a request.

We therefore urge upon the Court that line of cases interpreting *Escobedo* which holds that there is a right to counsel during the interrogation period for any person under arrest; *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965); *Wright* v. *Dickson*, 336 F. 2d 878 (9th Cir. 1964); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa. 1965).

We deal with the basic principle, the principle expressed by Justice Douglas in his concurring opinion in *Culombe* v. *Connecticut*, 367 U.S. 568, 637, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), that "any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This constitutional principle is not incompatible with proper law enforcement. It will have no effect on organized crime, whose members know the method of combat with society all too well; the principle here advocated as a practical matter of solid experience applies primarily to the poor, the ignorant, and frequently, those of limited mental ability. The right to counsel under public defender systems may well be costly, but the dollar cost of preservation of a constitutional right is no reason for ignoring that right.

The larger problem is whether extending the right to counsel into the interrogation period will unduly handicap the police in their work. Numerous reports of actual experience are analyzed in the brief to show that this hazard need not be heavily weighed. Concrete experiences for vari-

ous cities are reported including the observation of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit who had been Detroit's police commissioner in 1962 and 1963. Judge Edwards attempted to apply "Supreme Court standards." He found no ill effects and much benefit. A review of actual experience shows that third degree abuses are not some remote fantasy; they happen now, and so does wrongful detention without charge and without counsel. These things occur in great numbers in today's United States. They are practices which, as the scrupulously meticulous Horsky Report for the District of Columbia concludes, "arrest for investigation should cease immediately."

At best, as a practical matter, confessions obtained from ignorant persons without counsel are the product of skilled leading by trained prosecutors or investigators. See the opinion of Judge Smith in *United States* v. *Richmond*, 197 F. Supp. 125 (D. Conn. 1960). Even without physical abuse, confessions are obtained by means wholly unworthy of free people. The evil of the "led confession" is particularly apparent in the instant case in which the defendant was clearly led into assertions which only dubiously originated with him, and without which would have led to his conviction for a grave but lesser offense.

When this defendant went into Interrogation Room 2, instead of having "the guiding hand of counsel" to which we believe the principles of *Powell* v. *Alabama* entitled him, he had the guiding hand of two policemen. When he came out of Interrogation Room 2, there was no longer any point in giving him counsel—his case was over. We believe that such practices are barred by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Argument

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast in that room at that time. There was no duress, no brutality. Yet when Miranda finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done. We have here the clearest possible example of Justice Douglas' observation, "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker* v. *California,* 357 U.S. 433, 444-45, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) (dissenting opinion).

The question presented is whether a defendant in such circumstances is entitled to be told of his right to counsel and to have a meaningful opportunity to consult counsel before the law disposes of him. For "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Justices Douglas, Black, and Brennan in *Spano* v. *New York,* 360 U.S. 315, 326, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

I.

There Is a Right to Counsel for Arrested Persons When Interrogated by the Police.

We deal here with growing law, and look to where we are going by considering where we have been. The existence of a right to counsel of any sort at any time did not exist in medieval England; Plucknett tells us that not until the 15th Century was counsel allowed to argue points of law; that in 1695 counsel was allowed in treason trials; and that not until 1836 was counsel allowed in felony cases.[4]

While English statutes did not provide for counsel in felony cases before 1836, in practice counsel did participate in English criminal trials before the American Revolution.[5] This is of consequence in understanding early American constitutional and statutory provisions of substantially the same vintage as the Bill of Rights. Many of these expressly or in practice asserted a right to counsel (New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Maryland, North Carolina, Georgia), and some of them even at that early time required that appointed counsel be made available (Connecticut, New York (*dubitante*), Pennsylvania, New Jersey, Delaware, and South Carolina).[6] Speaking broadly, therefore, the Sixth Amendment was in general accord with the English and American practice of its time: "In all criminal prosecutions, the accused shall

---

[4] Plucknett, *A Concise History of the Common Law*, 385-86 (2d ed. 1936), citing for the 1837 development to 6 & 7 Will. IV, c. 114.

[5] Comment, *An Historical Argument* [*etc.*], 73 Yale L.J. 1000, 1027-28 (1964); and see historical analysis in *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).

[6] *Id.*, appendix, 73 Yale L.J. at 1055-57.

enjoy the right . . . to have the assistance of counsel for his defence."

Sixth Amendment problems came to the Court surprisingly late, both as to federal and state procedure.

A. Federal Experience.

The leading case is *Johnson* v. *Zerbst,* 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938). In that case, petitioner, without counsel, had been convicted of counterfeiting. There was a conflict as to whether or not he had asked for counsel. The decision decisively establishes as an "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . . " 304 U.S. at 462-63. The opinion, quoting from *Powell* v. *Alabama,* 287 U.S. 45, 68, 69, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932), repeats that a defendant " 'requires the guiding hand of counsel at every step in the proceedings against him.' " 304 U.S. at 463. Hence in *Johnson* v. *Zerbst,* the Court declared that "the Sixth Amendment withholds from Federal Court, in all criminal proceedings, the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel." *Ibid.*[7]

The Court further declared that "since the Sixth Amendment constitutionally entitled one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential judicial prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.* at 467.

---

[7] The case also considered the subject of waiver, a matter we do not develop here because there is no waiver question in the *Miranda* case, there being no suggestion that the defendant had the faintest notion of any right to counsel.

The requirements of *Johnson* v. *Zerbst* were carried into effect by Rules 5 and 44 of the Rules of Criminal Procedure. Rule 5 expressly provides that any arrested person should be taken "without unnecessary delay before the nearest available commissioner" who is to tell the accused both of his right to stand silent and of his right to counsel. Rule 44 confirmed this provision by providing for appointment of counsel if need be. But it should always be remembered that these rules were simply manifestations of the Sixth Amendment as declared in *Johnson* v. *Zerbst.*

Rule 5 with its provision for arraignment "without unnecessary delay" became the battleground for the immediate issue now before the Court. If the defendant is brought before the commissioner instantly, he cannot be interrogated before being informed of his right to counsel. On the other hand, if the period pending presentment is protracted, the right to counsel can, as in the instant case, be made meaningless because the defendant may be in such a position before the arraignment that a combination of Clarence Darrow and John W. Davis reincarnated could do him no good. In *McNabb* v. *United States,* 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 219 (1943), the issue was whether a confession should be excluded which was obtained in the course of an extended interrogation. The defendants "had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance." 318 U.S. at 335. This Court, taking up the matter from the standpoint of "civilized standards" of justice, *id.* at 340, found that the procedure followed "tends to undermine the integrity of the criminal proceeding." *Id.* at 342. The Court, analyzing the proper division of functions in criminal law enforcement, declared that proper procedure "aims to avoid all the evil implica-

tions of secret interrogation of persons accused of crimes." *Id.* at 344.

McNabb scrupulously avoids constitutional interpretation, restricting itself to a matter of proper federal practice. The *McNabb* rule was not applied in *United States* v. *Mitchell*, 322 U.S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944) where the confession was held to be so immediate that it was construed to be spontaneous. However, the rule was applied again in *Upshaw* v. *United States*, 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), a case in which the defendant confessed during a thirty-hour detention. The Court in *Upshaw* stressed that the object of the *McNabb* rule and of Rule 5 was to "check resort by officers to 'secret interrogation of persons accused of crime.'" 335 U.S. at 412. The matter of obtaining counsel was considered by the dissent, which observed that the practical effect of speedy application of the rule was that "prompt hearing gives an accused an opportunity to obtain a lawyer," with all of the consequences of giving legal advice to "the illiterate and inexperienced." 335 U.S. at 424.

The matter was again reviewed in *Mallory* v. *United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957). In *Mallory*, the defendant, like the defendant here, was charged with rape. He was interrogated for about ten hours after his arrest, the inquiry going deep into the night, at the end of which he made a confession. The next morning he was brought before a commissioner. The Court noted that the Criminal Rules were adopted "since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of 'the third degree;'" and that therefore the police could detain a person only until "a committing magistrate was readily accessible." 354 U.S. at 453.

The Court held that the time interval permitted between arrest and presentation to a magistrate was intended to give "little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." It added that a person was to be arraigned "as quickly as possible so that he may be advised of his rights . . . But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Id.* at 453-54. The Court noted that the defendant had not been "told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent . . . " *Id.* at 455. The opinion concluded "it is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Id.* at 456.

Mallory was the unanimous expression of this Court. Once again the case did not formally involve a constitutional issue, but rather the interpretation of the rules of criminal procedure. Unlike its predecessor, the opinion did not refer to constitutional standards. Nonetheless, *Mallory,* by its express recognition of the legitimate need for counsel during the interrogation, went far to establish for the federal system the principle here advocated.

B. The Constitutional Principles Applied to State Criminal Proceedings; the Development to Escobedo.

The development of constitutional doctrine as applied to state proceedings can be grouped around three key decisions, *Powell* v. *Alabama,* 287 U.S. 45, 53 Sup. Ct. 55, 77

L. Ed. 158 (1932); *Betts* v. *Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942); and *Gideon* v. *Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963).

(a) *The Powell period (1932-1942).*

Powell is too familiar to warrant restatement. In this famous rape case, counsel was appointed but exercised only a nominal function, permitting defendants to be hustled to trial. The function of counsel was described as "pro forma." The Court held that:

> "defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities. . . . The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result the defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." 287 U.S. at 58-59.

This Court in *Powell* recognized that the right to counsel was a growing, not a static, constitutional right. It refused to be guided by the standards of England at the time the Constitution was adopted, following instead the more liberal practice of the various colonies. The right to counsel was held to be one of those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " *id.* U.S. at 67, quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926); it was expressly held to be an integral part of the right to a fair hearing. This led Justice Sutherland to the classic passage: the person charged with the crime "requires the guiding hand of counsel at every step in the proceedings

against him." This said the Court, was true for men of intelligence and even more true for "the ignorant and illiterate, or those of feeble intellect." 287 U.S. at 69. The trial court therefore must first give the defendant the right to employ counsel, and second, if need be, must appoint counsel. The Court made no decision as to non-capital cases, but as to capital cases it held that:

> "where the defendant was unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Miranda strikingly parallels the *Scottsboro* case; here, as there, the defendant did not have counsel "at such times or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Immediately after *Powell,* the right to counsel cases began to relate directly to the forced confession cases; as this Court said in *Mallory, supra,* secret interrogation, which is interrogation without counsel, tends to slide into the third degree. Thus in *Brown* v. *Mississippi,* 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), the leading confession by torture case, the Court mentioned *Powell* as illustrative of the principles of basic justice, observing that "the state may not deny to the accused the aid of counsel." In *Brown,* trial counsel failed to make proper objections to confessions obtained by violent beating. In *Chambers* v. *Florida,*

309 U.S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940), a long additional step was taken. In *Brown*, it was indisputable that physical violence had been applied to the defendants. In *Chambers* there was a factual dispute as to whether or not there had been physical compulsion. This Court nonetheless held that the protracted questioning, in all of the circumstances, banned the confession under the Fourteenth Amendment, noting that the defendants had been held and interrogated "without friends, advisers, or counselors." 309 U.S. at 238.

The state of the law as it stood in relation to right to counsel and confessions in 1940 may fairly be summarized as follows:

In the federal courts there was an absolute right to counsel in criminal cases. In the state courts there was an absolute right to counsel, and appointed counsel at that, at least in capital cases, the matter being reserved as to non-capital cases. A confession obtained by force could not be used, and a confession obtained by protracted interrogation where there was an unresolved dispute as to force, and where the defendant had been interrogated, among other things, "without counselors" denied due process. There was, however, an ambiguity left open by the *Powell* case. The Court had declared in *Powell* that a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him;" but there had not yet been resolved the question of whether "every step in the proceedings" really meant "every step in the proceedings," which would include interrogation, or whether, despite the broad sweep in the language, something less was intended.[8]

---

[8] This summary does not take account of *Lisenba* v. *California*, 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941). *Lisenba* in-

(b) *The Betts period (1942-1963).*

Betts, like *Powell,* is too familiar to need restatement. The case held, in its chief conclusions, that while counsel was required in capital cases and in some undefined other cases, it was not required in all cases. But on the way to reaching that decision, *Betts* also decided one other point of great importance in the instant case. It expressly recognized that under the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra,* appointed counsel was required "in all cases where a defendant is unable to procure the services of an attorney." 316 U.S. at 464. It thereupon examined the question of whether Sixth Amendment principles should in fact be imported into the interpretation of the Fourteenth Amendment. This vital question is answered in the negative, thus laying the foundation for the particular conclusion *Betts* reached. Justices Black, Douglas and Murphy dissenting did so expressly on the ground that the Sixth Amendment is applicable to state criminal proceedings, the view adopted twenty years later in *Gideon.*

During the reign of *Betts,* the confession cases turned on "special circumstances," as is illustrated in the citations

---

volved a confession obtained upon protracted interrogation. The majority noted expressly that "counsel had been afforded [the petitioner] and had advised him." Apparently petitioner saw his attorney as much as he wished up to the critical day of his interrogation and confession. 314 U.S. at 230-31, 240. Hence the majority, in upholding the use of the confession, expressly noted that this was not a case in which he had been interrogated "without the advice of friends or of counsel;" (*id.* at 240) and the Court further observed that if a person held were incommunicado, subject to questioning for a long period, "and deprived of the advice of counsel," (*ibid.*) it would inspect the matter with great care. On the other hand, the dissent shows that the defendant was without counsel on the critical confession day, 314 U.S. at 242. In view of these specialized facts, we put the case aside in considering the immediate problem.

in the concurring opinion of Justice Clark in *Gideon* v. *Wainwright*, 372 U.S. at 347-49. This same specialized notion of the circumstances applied also to the right to counsel as it related to the interrogation. An example is *Haley* v. *Ohio*, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948). In this case a fifteen year old boy was interrogated for five hours before he confessed to murder. The judgment of the Court reversing the conviction was announced by Justice Douglas, and joining with him in an opinion were Justices Black, Murphy and Rutledge. This opinion particularly stressed that "at no time was this boy advised of his right to counsel." Noting the youth of the defendant, the opinion said:

> "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.
>
> "This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission." 332 U.S. at 600.

It was asserted that the petitioner had signed a confession, and that the signed confession asserted that he knew fully of his rights. Said these four Justices: "That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions." *Id.* at 601. The four Justices made clear that they were not announcing a principle simply for boys in custody, but one which applied equally to any defendant: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." *Ibid.*

We assume that the opinion in *Haley,* had it been of five Justices, would totally control in the instant situation. The interrogation, though at an odd hour, was relatively brief, and the opinion, emphasizing the necessity of counsel, tells us that the same principles apply to adults. But there were not five. Justice Frankfurter concurred specially, also noting the interrogation without counsel carries temptations for abuse. *Id.* at 605. He concluded that the confession should be barred because of specialized circumstances in the particular case, without reaching the broader question. The dissenting Justices were apparently content that the boy had not asked for counsel before his arraignment.

In 1957, two new voices were added in this Court on the right to counsel at the interrogation state. The case was *In re Groban's Petition,* 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957), in which the issue was the validity of an inquiry by the Ohio State Fire Marshal into the cause of a fire, the inquiry involving compulsory testimony

without presence of counsel. The majority opinion, by Justice Reed on his last day on the Court, found distinctions because this was an administrative hearing and therefore did not reach the principal question. Justice Black, for Chief Justice Warren and Justices Douglas and Brennan, did. What was said by those four Justices there synthesizes everything we have to say in the instant case (352 U.S. at 340-44). At any secret hearing,

1. "The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. . . ."

This hazard is diminished by having the public or suspect's counsel present.

2. "Behind closed doors he [the defendant] can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will." *Id.* at 341-42.

3. "Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

4. "I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use

legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him."

5. "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

These same dissenting Justices expressed their views again in *Crooker* v. *California*, 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) and *Cicenia* v. *La Gay*, 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958). Crooker confessed during interrogation after he had asked for counsel and it was refused him. The Court, in passing upon the admissibility of the confession, concluded that the sole real issue was whether he had been coerced by the denial of his request for counsel. Citing various cases to the effect that confessions made prior to State appointment of counsel are not thereby rendered involuntary, the Court upheld the conviction. Applying the special circumstances test, it concluded that the particular petitioner was able to take care of himself without counsel at that stage. The Court held that State refusal of a request to engage counsel was a denial of constitutional rights "if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence" of fundamental fairness. 357 U.S. at 439. This, it was held, depended on the circumstances of the case. The Court rejected the view, as having a "devastating effect on enforcement of criminal law," that police question-

ing, fair as well as unfair, should be precluded until the accused is given an opportunity to call his attorney. *Id.* at 440.

Justice Douglas, for Chief Justice Warren and Justices Black and Brennan, gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage, first to avoid the third degree, second because of the impossibility of determining disputes over what actually happened in the secret chamber, and finally, because of the importance of pretrial period. These Justices adopted the view that "'the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial.'" *Id.* at 445-46. They also adopted the statement of Professor Chafee, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." *Id.* at 446. Adopting the views of *Powell* v. *Alabama* and the views of the dissent of *In re Groban's Petition,* both *supra,* this opinion concluded that "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest." *Id.* at 448.

Cicenia involved similar issues. The defendant, before his indictment, was interrogated at the police station. He wanted counsel then and his family wanted to provide it, but the police did not permit the petitioner to meet with his lawyer or his family until after they had the confession. A majority rejected the view "that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved." 357 U.S. at 509. The same

dissenters as in *Crooker* (except Justice Brennan, not participating) disagreed; they believed that *Cicenia* was "the occasion to bring our decision into tune with the constitutional requirement for fair criminal proceedings against the citizen." *Id.* at 512.[9]

Soon after *Crooker* and *Cicenia*, the tide which was to overrule *Betts* began to flow with new vigor. In *McNeal* v. *Culver*, 365 U.S. 109, 81 Sup. Ct. 413, 5 L. Ed. 2d 445 (1961), Justices Douglas and Brennan called outright for the overruling of *Betts*. In *Culombe* v. *Connecticut*, 367 U.S. 568, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), Justices Frankfurter and Stewart, applying the particular circumstances approach, held that a confession should not be admitted. Those Justices pointedly rejected the view that all persons under interrogation should be entitled to counsel. Observing that "Legal counsel for the suspect will generally prove a thorough obstruction to the investigation," 367 U.S. at

---

[9] Another case of this special circumstances type is *Reck* v. *Pate*, 367 U.S. 433, 81 Sup. Ct. 1541, 6 L. Ed. 2d 948 (1961). Justice Douglas concurring said, "I would hold that any confession obtained by the police while the defendant is under detention is inadmissible unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel." 367 U.S. at 448. See also *Spano* v. *New York*, 360 U.S. 315, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959), in which the defendant had been indicted and thereafter confessed without counsel. Chief Justice Warren for the Court said that the "abhorrence of society to the use of involuntary confessions" among other things "turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 360 U.S. at 320-21, footnote 2 on 321 summarizing the confession cases from *Brown* to this point. Justices Douglas, Black and Brennan, concurring, held that after indictment certainly the Government can never interrogate the accused in secret when he has asked for his lawyer. Justice Stewart, concurring, rested heavily on the fact that this defendant was under indictment.

580, their opinion reviewed the practice of other countries and again observed that the *McNabb* principles had not been applied to state cases. Justices Douglas and Black wished to rest frankly on the principle "that any accused —whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused," his constitutional rights are violated. *Id.* at 637. While an attorney may tell a defendant of his constitutional right not to testify, these Justices felt that all defendants are entitled to know their constitutional rights.

At the end of the *Betts* period, the condition of the constitutional law on the right to counsel at trial or during interrogation and the meaning of that right was this: a majority of this Court, so far as decisions were concerned, either had participated in *Betts* or had not yet disapproved it. The state of the law therefore was while a person was entitled to counsel of his choice in every case, *Chandler* v. *Fretag,* 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4 (1954), he was not yet entitled to appointed counsel at actual trial in every case. He was entitled to counsel in all federal cases; he was entitled to counsel at trial in all state capital cases; and he was entitled to counsel at trial in all other cases dependent upon special circumstances. This right in capital cases extended also to the arraignment, at least where the arraignment was "a critical stage in a criminal proceeding," because "What happens there may affect the whole trial." *Hamilton* v. *Alabama,* 368 U.S. 52, 54, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961). Four Justices of this Court (Chief Justice Warren and Justices Black, Douglas and Brennan) had expressed views indicating a belief that there was a right to counsel at interrogation, but a majority was not ready to go so far.

(c) *The Gideon period (1963-).*

In overruling *Betts*, Justice Black for the Court closed the circle by applying the principle of his own 1938 opinion of *Johnson* v. *Zerbst, supra,* to state proceedings. This Court in *Gideon* thus erased the fundamental distinction between the state and federal cases by holding that the Sixth Amendment guarantee of counsel was of such character that it applied to the states in full. The Court, readopting the conclusive authority of *Powell* v. *Alabama,* declared that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 372 U.S. at 344. Justice Douglas, concurring, noted that this did not mean that some kind of a watered-down version of the Sixth Amendment was made applicable to the states—its totality applied to both.

It follows that so far as the Sixth Amendment is concerned, after March 18, 1963, there is no difference between the right to counsel as provided in that Amendment in the two court systems. *Gideon* was followed shortly by *Haynes* v. *Washington,* 373 U.S. 503, 83 Sup. Ct. 1336, 10 L. Ed. 2d 513 (1963), holding that the failure to tell a defendant under interrogation that he is entitled to be represented by counsel is one of the factors relevant to determining whether his confession was voluntary, 373 U.S. at 516-17; and by *White* v. *Maryland,* 373 U.S. 59, 83 Sup. Ct. 1050, 10 L. Ed. 2d 193 (1963), which further extended the rule of *Hamilton* v. *Alabama.* In *White,* at a preliminary hearing, defendant pled guilty without counsel. Thereafter he was always afforded counsel. This Court held in effect that any stage at which a person can plead guilty is "critical" and he is entitled to counsel then.

C. Escobedo and the Present Day.

The welter of cases obscures the simple lines of the situation. As of the spring of 1963, this law applied to these situations:

1. Defendants were entitled to counsel at all trials in the federal courts under *Johnson* v. *Zerbst, supra.*

2. Defendants in state courts were entitled to counsel in all trials, *Gideon* v. *Wainwright, supra.*

3. Persons were entitled to counsel in all federal arraignments (Rule 5 of the Rules of Criminal Procedure, as repeatedly interpreted), and in all arraignments or analogous proceedings under state law at which anything of consequence can happen; *Hamilton* v. *Alabama, supra;* and *White* v. *Maryland, supra.*

4. Several Justices believed that in all cases, a person who requested counsel at pre-arraignment investigation was entitled to it, at least in cases in which he wanted to consult his own lawyer; but this was not yet a majority view, *Crooker* v. *California, supra,* and *Cicenia* v. *La Gay, supra.*

5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right. See for the views of Chief Justice Warren and Justices Black, Douglas, and Brennan, variously the *Groban, Crooker,* and *Cicenia* cases, *supra.*

Situation 5 is that presented in the instant case. *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) settled point 4. In *Escobedo,* the defendant, after arrest but before indictment, repeatedly asked to see his counsel and was effectively barred from doing so by the

police. The Court held that it was immaterial whether the defendant had yet been indicted—"It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486. The Court, following the New York rule in *People* v. *Donovan*, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (1963) held that a confession even prior to indictment after an attorney had been requested and denied access to see the person, could not be used in a criminal trial.[10] Following the dissenting opinion of *In re Groban, supra*, the Court held that it would make a mockery of the right to counsel if a person were entitled to counsel at trial but not at an earlier stage which in truth disposed of the case. *Cicenia* and *Crooker*, after some attempt to distinguish them, were put aside with the observation that insofar as they might "be inconsistent with the principles announced today, they are not to be regarded as controlling." *Id.* at 492. In summary, *Escobedo* held: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Ibid.*[11]

---

[10] This had special importance because of *Malloy* v. *Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), holding that the states cannot, any more than the federal government, abridge the privilege against self-incrimination. Since a principal function of counsel is to advise a defendant of his constitutional rights, including specifically the right against self-incrimination, and since the most significant point of this abridgment is at the interrogation stage, *Malloy* buttressed the necessity of the right to counsel at this point.

[11] *Escobedo* further developed *Massiah* v. *United States*, 377 U.S. 201, 84 Sup. Ct. 1199, 12 L. Ed. 2d 246 (1964) an opinion by

We cannot in candor assert that *Escobedo* unequivocally establishes a right to counsel at the interrogation stage in all situations. Certainly, the three dissenting Justices so construed it, *Id.* at 496-97. On the other hand, any case may depend on its facts. In *Escobedo*, without doubt, the defendant did ask for counsel at the interrogation stage, this was denied him, and the Court did mention this as one of the factual elements in its decision. For an expression of honest puzzlement as to the scope of *Escobedo*, see *Miller* v. *Warden, Maryland Penitentiary*, 338 F. 2d 201, 204 (4th Cir. 1964).

Shortly before *Escobedo*, Justice Douglas, in discussing the need for counsel at the interrogation stage, said that "the federal law here is still halting or yet unborn." Douglas, *The Right to Counsel*, 45 Minn. L. Rev. 693-94 (1961). The new birth which Justice Douglas anticipated in 1961 has led to a nationwide series of conflicting decisions of which the instant case and *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), are typical. The Arizona Supreme Court in the instant case focused upon the fact that in *Escobedo*, the defendant asked for counsel whereas in the instant case, he did not, and therefore reached opposite

---

Justice Stewart in which the defendant was induced to make statements, without counsel present, after his indictment. The Court adopted the rule that any "secret interrogation" after the indictment without the protection of counsel vitiated any confession so obtained. Three dissenting judges in *Massiah* thought that the reasoning of the case should apply equally to "statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not," 377 U.S. at 208; and in *Escobedo*, the majority took the view that no meaningful distinction can be drawn between interrogation of an accused before indictment or after. However, in *Escobedo* Justice Stewart expressed his own view that the fact of indictment "makes all the difference." 378 U.S. at 493.

results dependent upon that request. Chief Justice Traynor had already, before *Escobedo*, led the way toward a right to counsel at the interrogation stage in *People* v. *Garner*, 57 Cal. 2d 135, 18 Cal. Rptr. 40, 367 P. 2d 680, 693 (1961) (concurring). This landmark analysis put aside any distinction between a right to counsel after as distinguished from before indictment.[12]

The only difference between *Escobedo* and *Dorado* was that Dorado had neither retained nor requested counsel. The California court concluded that whether or not the accused had requested counsel was "a formalistic distinction." It read *Escobedo* to mean that defendant's right to counsel did mature at the accusatory stage; "the stage when legal aid and advice were most critical" to defendant; therefore California held that his vocalization of that right cannot be the determinative factor. 42 Cal. Rptr. at 175, with comprehensive citations following. Hence, California concluded that "the right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it." *Id.* at 176.

Indeed, there are numerous decisions of this Court holding that the right to counsel, where it indisputably exists, does not depend upon a request for it; see for example,

---

[12] "It is a formalistic assumption that indictment is the point when a defendant particularly needs the advice and protection of counsel. Often a defendant is arrested under highly suspicious circumstances and from the time he is apprehended his guilt is a foregone conclusion in the minds of the police. Frequently too, suspicion falls upon him at some intermediate point before indictment. In some cases the evidence against the accused may be stronger at the moment of arrest than it may be in other cases when the indictment is returned. It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment than he is an hour after." 367 P. 2d at 695.

Carnley v. *Cochran,* 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962), holding with numerous citations that "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." 369 U.S. at 513; and see, for post-*Gideon* application of this rule, *Doughty* v. *Maxwell,* 376 U.S. 202, 84 Sup. Ct. 702, 11 L. Ed. 2d 650 (1964). Relying on the *Carnley* opinion, the California court concluded that the presence or absence of the request was immaterial, a conclusion reached also because "we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize the defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." 42 Cal. Rptr. at 177-78. Hence, it held that at the interrogation stage a defendant must be informed of his rights so that he can intelligently waive them.

As noted, the cases have divided. *Wright* v. *Dickson,* 336 F. 2d 878, 882 (9th Cir. 1964) expressly holds that under *Escobedo,* the test is whether "the investigation was then no longer a general inquiry but had focused on appellant," and it is immaterial whether or not "appellant asked to consult retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact might bear upon waiver." See to the same effect, *United States ex rel. Russo*

v. *New Jersey*, 351 F. 2d 429, 438 (3d Cir. 1965);[13] and see the opinion of Tuttle, *J.*, in *Collins* v. *Beto*, 348 F. 2d 823, 830-31 (5th Cir. 1965), with abundant citations. See also, as an example of a state reversing itself to accord with this position, *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa. 1965).

Yet not only the instant case, but numerous others go the other way. See for example, *People* v. *Gunner*, 15 N.Y. 2d 226, 205 N.E. 2d 852 (1965), although Chief Judge Desmond and Judge Fuld disagree with that conclusion; see 205 N.E. 2d at 855-56. See also as illustrations of cases limiting *Escobedo* to its facts, *Latham* v. *Crouse*, 338 F. 2d 658 (10th Cir. 1964); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964); *United States* v. *Ogilvie*, 334 F. 2d 837 (7th Cir. 1964); *Mefford* v. *States*, 235 Md. 497, 201 A. 2d 824 (1964).[14]

D. The Right to Counsel at Interrogation: 1966.

The issue is whether, under the Sixth Amendment to the Federal Constitution as made applicable to the states by the Fourteenth, there is the same right to counsel at interrogation of an arrested suspect as there is at arraignment (*Hamilton* v. *Alabama, supra; People* v. *White, supra*) or

---

[13] "No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver."

[14] For other cases to the same effect, see Note, *The Right to Counsel During Police Interrogation*, 25 Md. L. Rev. 165, 172, n. 58 (1965); and see Dowling, *Escobedo and Beyond*, 56 J. Crim. Law 143, 155, notes 81 and 82 (1965). Outstandingly useful articles relating to the problems of this case are Comments at 53 Calif. L. Rev. 337 (1965); 52 Geo. L.J. 825 (1964); 25 Md. L. Rev. 165 (1965); and 32 U. Chi. L. Rev. 560 (1965).

at trial (*Johnson* v. *Zerbst, supra; Gideon* v. *Wainwright, supra*).

The right does exist. It is the same. This is not the result of a single case, *Escobedo* or any other. Rather, there is a tide in the affairs of men, and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused. The *McNabb-Mallory* line of cases may in terms be restricted to the rules, but the rules themselves are a reflection of the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra.* Once the Sixth Amendment is clearly applicable to the states (*Gideon* v. *Wainwright*), then the constitutional standards are the same. *Escobedo,* although all that was involved there was a fact situation in which a request had been made and denied, necessarily transcends its facts because it recognizes the interrogation as one of the sequence of proceedings covered by the Sixth Amendment. Since *Carnley* v. *Cochran, supra,* bars unwitting waiver under the Sixth Amendment, it necessarily applies to the totality of that to which the Sixth Amendment applies, and this must necessarily run, as it does, from the interrogation after arrest through the appeal.[15]

We have in this galaxy of cases not a series of isolated phenomena, but reflections of basic belief, beliefs which were expressed in the dissents in *In re Groban; Crooker;* and *Cicenia;* in *Gideon;* in *Malloy* v. *Hogan, supra,* extending the freedom from self-incrimination to the states; and in *Escobedo.* These are all different manifestations of the view expressed by Justice Douglas in *Culombe* v. *Connect-*

---

[15] For able development of a similar approach and view, see the dissenting opinion of Chief Judge Brune in *Prescoe* v. *State,* 231 Md. 486, 191 A. 2d 226, 232 (1963). We have not considered any of the problems of waiver or any of the problems of pre-arrest interrogation in this case since they are not here.

icut, supra, concurring, where he said, the "principle is that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This case is not to be decided by the color-matching technique of determining whether one case looks just like another case. We deal with fundamentals of liberty, and so, in consequence, with basic belief. The suggestion that the defendant must ask for counsel is to make a great matter depend upon a formal distinction. We warmly commend to this Court *Oregon* v. *Neely,* 239 Ore. 487, 398 P. 2d 482, 486 (1965):

> "Adoption of the distinction advanced by the state would lead to results contrary to the basic beliefs of the United States Supreme Court and of this court. . . . If the state's distinction were accepted, we would grant the assistance of counsel to those educated enough to demand it and deny it to those too ignorant to ask for it. The United States Constitution demands equal treatment during the criminal process for the inexperienced and the uneducated."

II.

Practical Considerations of Law Enforcement Accord With Giving the Sixth Amendment Its Full Meaning.

Whenever rights are recognized for those charged with crime, sincere people will inescapably be concerned as to the effect of those rights on law enforcement. In *Powell* v. *Alabama, supra,* the defendants were tried within a few days of the crime, and in holding that this matter had been hustled too much, this Court found it necessary to discuss

also the problem of the "great and inexcusable delay in the enforcement of our criminal law" as "one of the grave evils of our time." 287 U.S. at 59. In *Chambers* v. *Florida, supra,* the Court observed that "we are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws," 309 U.S. at 240, with a note analyzing the literature in relation to the use of the third degree to obtain confessions. Justice Jackson, in *Watts* v. *Indiana,* 338 U.S. 49, 57, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949) made the classic statement of the conflict:

> "To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of crime . . . [A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances." [16]

Justice White, dissenting for himself and Justices Clark and Stewart in *Escobedo,* expressed concern for the crippling effect of the decision on law enforcement, 378 U.S. at 499. Justice White, joined by Justices Clark and Harlan, in their dissent in *Massiah, supra,* also developed the matter largely in terms of the effect of the rule on law enforcement, moving from the premise that "a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it." 377 U.S. at 207.

---

[16] Justice Jackson continued: "If the State may rest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guarantee of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government knows how helpless he is to protect his client against the facts thus disclosed." 338 U.S. at 59.

With so many members of this Court concerned with the constitutional rule from the practical standpoint of law enforcement, that matter requires independent consideration. The principal practical concerns are two: first, that the system established will be expensive; and second, that it will prevent the detection and punishment of the guilty. At a time when American society is deeply and justly concerned both with rising crime rates and with the menacing existence of organized crime, these are genuinely serious problems.

We begin by observing that the principles here advocated will have exactly zero effect on organized crime. This case involves an important constitutional principle, but it must not be made more important than it is. This case is not a grand caucus on whether sin or virtue should be the order of the day; we are dealing with the precise problem of whether a person charged with crime is to be made effectively aware of his right to counsel at the interrogation stage, and whether he is to be supplied counsel if he needs it at that point. None of this has any application to organized crime at all. The criminal gangs know perfectly well what tools, both physical and legal, they may use in their battle with society. The confession and right to counsel cases which have been before this Court so constantly since *Powell* v. *Alabama* have almost never involved gang-type criminals. The crimes from *Powell* (rape) to *Miranda* (rape) have almost always been rapes and murders, involving defendants poor, poorly educated, and very frequently, as here, of very limited mental abilities. The rich, the wellborn, and the able are adequately protected under existing constitutional standards, and the sophisticates of crime do not need this protection. We are talking here about precisely what was involved in *Chambers* v. *Florida*

twenty-five years ago, the "helpless, weak, outnumbered." 309 U.S. at 241.

A. Cost Factors.

Public defender systems cost money. Many defendants are indigents, and extending the right to counsel into the interrogation stage will increase personnel, paperwork, costs of all kinds. It will make some kind of public defender system virtually obligatory.[17] But the cost increase will by no means be limited to defense costs. As Mr. J. Edgar Hoover observed in 1952, full use of proper scientific methods should make it unnecessary for officers to use dishonorable methods of detection;[18] this inescapably means increased prosecution costs. A laboratory costs more than a strap, and so does the training of those who wield a microscope rather than a whip.

There are undoubtedly cheaper methods of law enforcement than those contemplated by the American Constitution. While some critics have contested the right to counsel in cost terms, no member of this Court has ever attempted to put a price tag on constitutional rights. Pepper in the eyes is cheaper than a fair trial and respect for constitu-

---

[17] Pollock, *Equal Justice in Practice*, 45 Minn. L. Rev. 737, 738-39 (1961) estimates 2,000,000 arrests for major offenses in a year, with 1,000,000 needing free legal representation and only 100,000 getting it. Birzon, Kasanof and Forma, in *The Right to Counsel*, 14 Buff. L. Rev. 428, 433 (1965) estimate 65% to 90% indigency among felony defendants in New York. For brief references, see Note, 1962 U. Ill. L.F. 645, n. 37, and for more extensive citations on the burdens involved, Comment, *Escobedo* v. *Illinois*, 32 U. Chi. L. Rev. 560, 580, n. 92 (1965); and see for anticipated cost analysis under federal legislation, Rep. Emanuel Celler, *Federal Legis. Proposals*, 45 Minn. L. Rev. 697 (1961).

[18] FBI Law Enforcement Bull., Sept., 1952.

tional rights in law enforcement will inescapably cost money.

Let it.

B. The Effect on Law Enforcement.

Some members of this Court have had severe doubts about the effect of the application of these principles in the operation of the criminal law, and some outside criticisms have been uninhibited. Professor Inbau regards *Escobedo* as "the hardest body blow the Court has struck yet against enforcement of law in this nation." [19] More temperate criticism of *Escobedo* develops the view that it "creates unnecessary and undesirable impediments to police investigation." [20]

While figures vary as to the number of crimes which are solved by confessions, that number is clearly extremely large. As Justice Jackson observed in the passage quoted above from *Watts* v. *Indiana*, a lawyer at the interrogation stage may well tell his client to stand mute, and the practical effect will be to eliminate large numbers of confessions.[21]

There have been several congressional inquiries into the problems of police interrogation.[22] Professor Louis B.

---

[19] As quoted in Dowling, *Escobedo and Beyond*, 56 J. Crim. L. 143, 145 (1965). Professor Inbau expresses himself also in *Restrictions in the Law of Interrogations and Confessions*, 52 Nw. U. L. Rev. 77 (1957).

[20] Enker and Elsen, *Counsel for the Suspect*, 49 Minn. L. Rev. 47, 48 (1965). See in particular, *Id.* at 62-63, n. 52, on the current developments under the English Judges' Rules.

[21] See Weisberg, "Police Interrogation of Arrested Persons," in *Police Power and Individual Freedom*. 153, 179 (Sowle Ed. 1962).

[22] See *Hearings on the Constitutional Aspects of Police Detention Before the Subcommittee on Constitutional Rights of the Senate*

Schwartz of the University of Pennsylvania has testified that in his experience, very few proper convictions had been lost because of the *Mallory* rule.[23] Senator Dominick noted the contradictory attitudes of the police and prosecutors as to the effect of the *Mallory* rule on the crime rate, with the police uniformly taking the position that the increase in crime in the District is directly related to the *Mallory* rule, while the United States Attorney and the Department of Justice indicate that the rule has very little effect on the releasing of guilty persons.[24]

Deputy Attorney General Ramsay Clark for the Department of Justice testified that the *Mallory* rule had not been

---

Committee on the Judiciary, 85th Cong., 2d Sess. (1958) (hereafter, *1958 Hearings*). See also the various Hearings on bills to alter the rule of *Mallory* v. *United States, supra. E.g., Hearings on H.R. 5688 and 5.1526 Before the Senate Committee on the District of Columbia,* 89th Cong., 1st Sess., pts. 1-2 (1965) (hereafter *1965 Hearings*). Prior to these Senate Hearings, the House Committee on the District of Columbia had submitted H.R. Rep. No. 176, 89th Cong., 1st Sess. (1965) (hereafter, *1965 Report*) to accompany H.R. 5688.

[23] *1965 Hearings,* pt. 1, at 107.

[24] *Id.* at 299. In earlier hearings, the Deputy Chief of Police for Washington, D.C., had contended that the *Mallory* rule results in freeing guilty persons and unduly hampers law enforcement, *1958 Hearings* 124-35. See also the testimony of Chief Layton, *1965 Hearings,* pt. 1, at 299.

The District Attorney of the District of Columbia, Mr. David Acheson, in 1964 said:

> " . . . Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain. . . . "

Quoted in the address of Judge J. Skelly Wright before the Annual Convention of the International Academy of Trial Lawyers, p. 10 (unpub., 1965), from which many of the conceptions of this brief are drawn.

shown to be a direct causative factor in crime or its increase; and the report of the United States Attorney attributes only two "lost" cases a year to the operation of the *Mallory* rule.[25] On the other hand, a report from the House Committee of the District of Columbia, H. Rep. 176, 89th Cong., 1st Sess. (1965) accompanying House Bill 5688, providing for amendment to the *Mallory* rule, does report an apparent relationship of the increase of the District of Columbia crime rate with *Mallory*.[26] A strong minority report shows that while there is a rise in crime in the District, nothing connects it to the *Mallory* rule or makes the rise attributable to *Mallory* in any way.[27]

There are other conflicting views. The New York City Police Commissioner in September of 1965 estimated that confessions were essential to conviction in 50 per cent of the homicides committed in New York in 1964 and, on the other hand, State Supreme Court Justice Nathan R. Sobel describes the view that confessions are the backbone of law enforcement as "carelessly nurtured nonsense."[28] New York District Attorney Frank S. Hogan says that the police are heavily dependent on confessions to get convictions in many cases and that "the whole purpose of a police investigation is frustrated if a suspect is entitled to have a lawyer during preliminary questioning, for any

---

[25] For Mr. Clark's statement, see *id.*, pt. 2, at 495; for that of Mr. Acheson, see note 36, *infra*.

[26] *1965 Report* 5. There is some testimony to the effect that it is very difficult to obtain convictions of criminals where neither scientific evidence nor eye witness identification is available. *Id.* at 65.

[27] *Id.* at 119.

[28] *New York Times*, Nov. 20, 1965, p. 1. Judge Sobel's views are published in N.Y.L.J., Nov. 22, 1965, p. 1, 4-5, and have very comprehensive statistics on various crimes and their relation to confessions.

lawyer worth his fee will tell him to keep his mouth shut." [29] On the other hand, Brooklyn District Attorney Aaron E. Koota believes that a person should have a lawyer "at the moment he comes into contact with the law." While some law enforcement officials claim that 75 to 85 per cent of all convictions are based on confessions, Judge Sobel's study, based on 1,000 Brooklyn indictments from February to April, 1965, showed that fewer than 10 per cent involved confessions.[30]

An extremely experienced point of view is that of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit, who resigned from the Michigan Supreme Court to be Detroit Police Commissioner in 1962 and 1963. Judge Edwards said, "We did take prisoners promptly before a judge. And the town did not fall apart. Murder and pillage did not run rampant." He added that he had attempted to run the Detroit Police Department by United States Supreme Court standards, and that it made law enforcement more effective, convincing more people that "we were moving toward making it more nearly equal in its application to all people, regardless of race or color." [31]

The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. Sec. 3006A, reflects the belief that early advice of right to counsel is compatible with good law enforcement. The Congressional Committee considered a report of the special committee of the Association of the Bar of the City of New York and of the National Legal Aid Association, which con-

---

[29] *New York Times*, Dec. 2, 1965, p. 1.

[30] *New York Times*, Nov. 22, 1965, p. 1, pt. 2.

[31] *New York Times*, Dec. 7, 1965, p. 33.

cluded that the public defender "system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal." [32] The Congress was also advised of the report of the Attorney General's Committee on Poverty and Administration of Federal Justice, February 25, 1963. This report in turn referred to the 1958 report of the New York City Bar and National Legal Aid Association Committee, asserting that "if the rights of the defendant are to be fully protected, the defense of his criminal case should begin as soon after the arrest as possible." A majority of the Attorney General's Committee endorsed this view, and recognized "strong argument that the time the defendant needs counsel most is immediately after his arrest and until trial." [33]

The Attorney General's Committee "after careful consideration" did not adopt that view for legislative purposes at that time but the actual bill which passed provides that the United States Commissioner for the Court should advise the defendant of his right to be represented by counsel and in appropriate circumstances should appoint counsel for him. 18 U.S.C. Sec. 3006A(b). Coupled with the *Mallory* rule, this for all practical purposes means forthwith advice of the right to counsel almost at once upon arrest.

The District of Columbia is the best testing ground for the effect of the Court's standards since it has been most affected by the *McNabb-Mallory* line of cases and at the same time is most analogous to the states of any part of the federal system. The leading study is *Report and Recom-*

---

[32] Hearing Before Senate Committee on the Judiciary on S. 1057, p. 24 (1963).

[33] *Id.* 197-205.

mendations of the Commissioner's Committee on Police Arrests for Investigation (1962), commonly known as the Horsky Report, for its chairman, Mr. Charles A. Horsky. The Horsky study shows that a very large number of arrests for investigation have been made in the District of Columbia, the number of persons being arrested on suspicion running about a third of those arrested for felonies.[34] An analysis of hundreds of cases of arrest for investigation, in which persons were interrogated privately, showed that this was not in fact a fruitful source of criminal convictions; only about five per cent were ever charged, and even this exaggerates the practical importance of the procedure.[35] As noted, the former United States Attorney, Mr. David Acheson, reported that only an average of about two cases a year were lost because of the *Mallory* decision.[36]

The Horsky Report is the richest single source on the practical aspects of secret interrogations. On both principle and practical considerations "the committee recommends that arrest for 'investigation' should cease immediately."[37] They invoked directly the principle of Blackstone's Commentaries:

> "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so

---

[34] Horsky Report, p. 9. For comparable Chicago experience, with statistical detail on the numbers of persons detained for investigation, see American Civil Liberties Union "Secret Detention by the Chicago Police" (Free Press, Glencoe, Ill., 1959). Based on a study of police records, the report concludes that in 1956 approximately 20,000 persons were held incommunicado for at least 17 hours, and 2,000 for 48 hours or more.

[35] Horsky Report, pp. 33-34.

[36] Horsky Report, p. 17.

[37] Horsky Report, pp. 41-71.

gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to a gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." [38]

As a practical matter, we cannot know with assurance whether the amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions.[39] The best of interrogation, as expounded for example by the principal publicist for secret inquiries, Professor Inbau, makes a poor case for itself as is illustrated in the note attached.[40] But assuming that there may be some unpredictable decline in the efficiency of

[38] Quoted at Report, p. 43.

[39] See for example the conflict between Inbau, *Police Interrogation—a Practical Necessity, in Police Power and Individual Freedom*, 147 (Sowle ed. 1962) with Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View, id.*, 153.

[40] The following note is taken bodily from Comment, *The Right to Counsel During Police Interrogation*, 53 Cal. L. Rev. 337, 351-52, note 75 (1965):

"75. See Inbau & Reid, *Criminal Interrogation and Confessions* (1962); Kidd, *Police Interrogation* (1954); Gerber & Schroeder, *Criminal Investigation and Interrogation* (1962). The Inbau and Reid book is a very specific and highly illuminating study of recommended techniques of interrogation. A paraphrase of the author's advice to the would-be interrogator might read: Impress the accused with your certainty of his guilt, and comment upon his psychological symptoms of guilt, such as the pulsation of a carotid artery, nail biting, dryness of the mouth, etc.; smoking should be discouraged because this is a tension-reliever for the guilty subject trying desperately not to confess; the sympathetic approach—anyone else under such circumstances would have acted the same way, suggests a less repulsive reason for the crime, and, once he

the conviction machinery, there are some distinctly practical plusses to be balanced against this. As Justice Douglas said in *United States* v. *Carignan*, 342 U.S. 36, 46, 72 Sup. Ct. 97, 96 L. Ed. 48 (1951), when a person is detained without arraignment,

---

> confesses, extract the real reason, condemn the victim, the accomplice or anyone else upon whom some degree of moral responsibility might be placed; understanding approach—a gentle pat on the shoulder, a confession is the only decent thing to do. I would tell my own brother to confess; forceful approach—exaggerate the charges against the accused, sweet and sour technique (one policeman is hostile to him while other acts as his friend); interrogation of the recalcitrant witness—at first be gentle and promise him police protection, then, if he still refuses to talk, attempt to break the bond of loyalty between him and the accused or even accuse him of the offense and interrogate him as if he were the offender.
>
> "The book written by Lt. Kidd provides fascinating reading for the novice. The following paraphrased extracts offer examples: The officer should not interrogate in a business office where there might be a recording device because he may make some statements which would be embarrassing if played back in court to rebut his testimony; feed upon suspect's likes and dislikes—love of mother, hatred of father, concern for children; never release pressure even when tears begin to flow; don't allow the accused any form of tension release at a critical moment in the questioning, such as a cigarette, a drink of water, or a trip to the washroom; play two co-conspirators against each other (often termed bluffing on a split pair)—claim that one talked and blamed the other, possibly using a false recording to substantiate this claim, continually take one out separately but never question him—the other will believe it necessary to tell his side of the story; aggressive approach—blame accused for crimes he didn't commit, play on the fact that many defendants fear the mental asylum more than jail.
>
> "An interesting article in the Gerber and Schroeder book noted the similarity between the methods of interrogation used today and the practices of the German Inquisition. See Gerber & Schroeder, *op. cit. supra* at 361-62."

See also, for illustration of interrogation methods, Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21, 31-32 (1965).

"the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient."

We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now.[41]

Moreover, some of the cost and efficiency comes from giving American citizens exactly what they are entitled to under the Constitution. It is, after all, the man's privilege to be silent, *Mallory* v. *Hogan, supra,* and it does smack of denial of equal protection to say that this is a right only for those well educated enough to know about it. But one need not reach to constitutional principle; there are, practically, equally important workaday considerations. As is well developed by Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125, 129 (D. Conn. 1960):

"Statements elicited during questioning are bound to be colored to some extent by the purpose of the questioner who inevitably leads the witness in the absence of court control. This coloring is compounded where the statement is not taken down stenographically, but written out as a narrative in language supplied by the ques-

---

[41] "The 'war on crime' is not a sporadic crisis, here today and gone tomorrow, justifying during its brief combat stage a shelving of long-standing immunities of the citizen." Sutherland, *supra,* n. 40, 79 Harv. L. Rev. at 40-41, supported by contemporary illustrations; and see citations collected in the Horsky Report, pp. 46-47.

tioner. Where the state of mind of the defendant is an issue in the case, as in determining the degree of a homicide, this wording of his account of the crime is of vital importance. . . . Had counsel been available to Reid he might have advised Reid of the danger to one on trial for his life on charges such as were faced by Reid of adopting the language of another in a statement signed by him.

> "Reid appears to have been suggestible, as might be expected in view of his age, mentality and education." [42]

Judge Smith's highly practical observations are of special application in the instant case. We deal here with rape and with what is, on the facts, an actual issue of penetration.[43] This defendant was obviously led in his alleged talk about vagina and penis, and had he not made or acquiesced in this very clearly led statement, might have been convicted for a lesser offense.

---

[42] We are not unaware that this case was reversed on other grounds, three to two by the Second Circuit, Judges Clark and Waterman dissenting on the issue of rehearing, 295 F. 2d 83 (2d Cir. 1961) and that certiorari was denied, 368 U.S. 948, 82 Sup. Ct. 390, 7 L. Ed. 2d 344 (1962). We respectfully commend it as a good case all the same.

[43] Without the "half-inch" statement in the confession (R. 69), there might have been no rape in this case at all. There was no medical testimony of any rape. In response to the prosecution's questions, the prosecutrix testified that at first the defendant was unable to make penetration; that later he did, but whether with his finger or his penis, she "was not sure" (R. 19). A few lines later, she said he made penetration with his penis (R. 20); but on cross, in response to the question of whether entry had been made "with his finger or his penis," she replied, "I don't know" (R. 32), and later she said, "I guess it was with his penis" (R. 33).

Conclusion

The day is here to recognize the full meaning of the Sixth Amendment. As a matter of constitutional theory and of criminal procedure, if a defendant cannot waive counsel unwittingly in one part of the conviction procedure, he should not be able to waive it at another. As a matter of practicality in law enforcement, we cannot know the precise effects of giving counsel at the beginning as the law does at the end; but we can know that there is not the faintest sense in deliberately establishing an elaborate and costly system of counsel—to take effect just after it is too late to matter. Yet that is precisely the *Miranda* case.

We invoke the basic principles of *Powell* v. *Alabama*: "He requires the guiding hand of counsel at every step in the proceedings against him." When Miranda stepped into Interrogation Room 2, he had only the guiding hand of Officers Cooley and Young.

We respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By JOHN P. FRANK*
JOHN J. FLYNN

January, 1966.

---

* Counsel notes with appreciation the research assistance of Mr. Robert Jensen of the Minnesota bar and Mr. Paul Ulrich of the California bar, both clerks in the office of counsel.

APPENDIX

Extracts from record in the companion case of *State* v. *Miranda*, 98 Ariz. 11, 401 P. 2d 716 (1965).

Mr. Turoff: What was your answer to this? Let me repeat the question. Did you make any threats to the defendant? Did you answer that?

A. Yes, I answered that. I didn't make any threats.
Q. Did you use any force on the defendant?
A. No, Sir.
Q. Did you offer the defendant any promises of immunity?
A. No, Sir, I did not.
Q. Officer, were you the arresting officer?
A. Yes, Sir.
Q. Did you arrest the defendant?
A. Yes, Sir.
Q. Are you the officer who brought him into the Interrogation Room?
A. Yes, Sir.
Q. Officer Young, was he also in the Interrogation Room?
A. Yes, Sir, he was with me during the time.
Q. And in your presence, did Officer Young make any threats?
A. No, Sir, he did not.
Q. Did Officer Young use any force on the defendant?
A. No, Sir, he did not.
Q. Did Officer Young make any promises of immunity to the defendant?
A. No, Sir, he did not.
Q. Officer, I ask you again, what was your question to the defendant and what was his answer to that question?

Mr. Moore: Comes now the defendant and objects for the reason—I would like to ask a question on voir dire before I make the objection.
The Court: All right, Mr. Moore.

By Mr. Moore:

Q. Did you say to the defendant at any time before he made the statement you are about to answer to, that anything he said would be held against him?

A. No, Sir.

Q. You didn't warn him of that?

A. No, Sir.

Q. Did you warn him of his rights to an attorney?

A. No, Sir.

Mr. Moore: We object, not voluntarily given.

Mr. Turoff: I don't believe that is necessary.

The Court: Overruled.

By Mr. Turoff:

Q. Would you tell us, Officer, now, what you said to the defendant after Miss McDaniels made her statement and what the defendant said to you regarding this charge.

A. I asked him, I said, "Is this the woman that you took money from?" and he said, "Yes, this is her."

Q. Did you ask him anything else? Was there any further conversation regarding the taking of this money?

A. Yes, Sir, we then—I believe he just volunteered the information and was saying—part of the conversation was with the woman at the time that the occurrence had happened.

Q. I didn't get that, Officer. He told you what conversation he had with her?

A. Yes, he did.

Q. I see; did he tell you also where this took place and when?

A. He wasn't exactly sure of the exact location. It was at approximately 2nd Street just north of Van Buren up around Taylor, somewhere in that vicinity. He wasn't sure of the exact location of the occurrence, but just the approximate location.

Mr. Turoff: I have no further question of this witness.

* * * * * * *

A. No, not right away.

Q. Later on when Miss McDaniels was present, did you have a discussion with the defendant concerning that charge?

A. Yes, Sir.

Q. Who was present at that conversation, Officer?

A. Myself, Detective Cooley, Mr. Miranda and Barbara McDaniels.

Q. I see; prior to that, had you made any threats or used any force on the defendant?

A. No, Sir.

Q. Had you offered the defendant any immunity?

A. No, Sir.

Q. In your presence, had Officer Cooley done any of these acts?

A. No, Sir.

Q. About what time did this conversation take place, Officer?

A. Approximately 1:30.

Q. Shortly after Miss McDaniels made her first statement, is that correct?

A. Yes, Sir.

Q. Can you tell us now, Officer, regarding the charge of robbery, what was said to the defendant and what the defendant answered in your presence?

A. I asked Mr. Miranda if he recognized * * *

* * * * * * *

A. When Mrs. McDaniels was in there, we were not armed—I was not.

Q. You were not?

A. No, Sir.

Q. But the defendant did know you were policemen?

A. Yes, Sir.

Q. And you did question him?

A. Yes, Sir.

Q. And you didn't warn him of his rights?

A. What is that?

Q. You never warned him he was entitled to an attorney nor anything he said would be held against him, did you?

A. We told him anything he said would be used against him, he wasn't required by law to tell us anything.

Q. Did you tell him that or did Mr. Cooley tell him that?

A. We both had told him.

Q. That is all you know about this? You don't know a thing about this except the conversation you heard, this robbery trial, isn't that right?

A. Yes.

Q. The conversation you heard in the interrogation room?

* * * * * * *

Office-Supreme Court, U.S.
FILED
FEB 9 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR RESPONDENT

Darrell F. Smith,
The Attorney General of Arizona

Gary K. Nelson,
Assistant Attorney General
Rm. 159, State Capitol Bldg.,
Phoenix, Arizona 85007

Attorneys for Respondent

Gary K. Nelson,
Assistant Attorney General,
Of Counsel

INDEX

SUBJECT INDEX

BRIEF FOR RESPONDENT

	Page
OPINION BELOW, JURISDICTION AND CONSTITUTIONAL PROVISIONS INVOLVED	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. INTRODUCTION	8
II. THERE ARE NO INHERENT DEFECTS EITHER IN THIS DEFENDANT, THE OPERATION OF LAW ENFORCEMENT AGENCIES, OR IN OUR SYSTEM OF CRIMINAL JUSTICE, WHICH REQUIRE A RULE OF THE CONSTITUTIONAL IMPACT AND PROPORTIONS HERE SOUGHT BY PETITIONER	9
A. THE DEFENDANT	9
B. THE POLICE	12
C. THE NATURE OF THE CONTEST	14
III. MIRANDA WAS NOT DENIED HIS RIGHT TO COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES	16
A. THE ARIZONA COURT'S DECISION	17
B. ESCOBEDO v. MIRANDA	18
CONCLUSION	26
APPENDIX A	29
APPENDIX B	33

TABLE OF CASES AND AUTHORITIES

CASES: Page

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 12

Brown v. Board of Education, 347 U.S. 483 (1954) 10

Carnley v. Cochran, 369 U.S. 506 (1962) 21, 22

Cicenia v. LaGay, 357 U.S. 504 (1958) 17, 21

Crooker v. California, 357 U.S. 433 (1958) 17, 21, 22

Escobedo v. Illinois, 378 U.S. 478 (1964) 16, 18, 19, 20, 21, 22, 24

Mapp v. Ohio, 367 U.S. 643 (1961) 23

Massiah v. United States, 377 U.S. 201 (1964) 15, 17, 18, 19

McGuire v. United States, 273 U.S. 95 (1927) 15

People v. Dorado, 42 Cal. Rptr. 169; 398 P. 2d 361 (1965) 18

Spano v. New York, 360 U.S. 315 (1959) 21

State v. Goff, ...Ariz. .....; 407 P. 2d 55 (1965) 18

State v. Miranda, 98 Ariz. 18; 401 P. 2d 721 (1965) 4, 17

United States v. Ventresca, 380 U.S. 102 (1965) 23, 26

Page

STATUTES AND RULES:

U.S.C., Const. Amend. VI 16
U.S.C., Const. Amend. XIV 16

28 U.S.C. Rules, Rules of the Supreme Court:
Rule 40, Subd. 1 (e) 4
Rule 40, Subd. 3 ..... 1, 2

42 U.S.C. §§ 3121-3226
(Public Works and Economic
Development Act of 1965) 10

OTHER:

Bob Hope Christmas Special,
N.B.C. Television Network,
Jan. 26, 1966, 8.30 P.M., M.S.T. 14

Comment, *Escobedo v. Illinois*,
25 Md. L. Rev. 165 (1965) 24

Comment, *Right to Counsel During Police
Interrogation, The Aftermath of Escobedo*,
53 Calif. L. Rev. 337 (1965) 24

Dowling, *Escobedo and Beyond*,
56 J. Crim. L., C.&P.S. 143 (1965) 24

Herman, *The Supreme Court and Restrictions
on Police Interrogation*,
25 Ohio St. L. J. 449 (1964) 24

Hoover, *Annual Report of the Federal Bureau
of Investigation, Fiscal Year 1965*,
U. S. Department of Justice 10

Inaugural Address of President John F. Kennedy,
Jan. 20, 1961, 107 Congressional Record, 1013 10

Kamisar, Inbau, and Arnold, *Criminal Justice in
Our Time*, (Magna Carta Essays, Howard Ed. 1965) 24

LaFave, *Detention for Investigation by the
Police: An Analysis of Current Practices*,
1962 Wash. U.L.Q. 331 12

Page

Milt, *How to Deal With Mental Problems,*
(Nat'l Assoc. of Mental Health Booklet 1962) 12

Nine "Unadoptable" Children Joined by Love,
Look Magazine, Oct. 19, 1965, at 54. 10

Norris, *Constitutional Law Enforcement is*
Effective Law Enforcement: (etc.),
43 U. Det. L.J. 203 (1964) 13

Note, *Escobedo in the Courts, May Anything*
You say be held Against You,
19 Rutgers L. Rev. 111 (1964) 24

Operation LEAP, *Ordinance No. S-3205,*
Dec. 15, 1964, City Council of Phoenix, Arizona,
Implementing Resolution No. 11887, Nov. 4, 1964. 10

Smith, *Police Systems in the United States,*
(2d Rev. Ed., 1960) 12

Sokol, *Brief of Amicus Curiae in the Escobedo Cases,*
(The Michie Company, 1966) 17, 24

State of the Union Address,
President Lyndon B. Johnson,
Jan. 12, 1966, 112 Cong. Record 129 10

Sutherland, *Crime and Confession,*
79 Harv. L. Rev. 21 (1965) 24

Winters, *Counsel for the Indigent Accused*
In Wisconsin, 49 Marq. L.J. 1 (1965) 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR RESPONDENT

OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS INVOLVED.

Pursuant to Rule 40, Subd. 3, Rules of the Supreme Court, 28 U.S.C. Rules, as amended, the respondent accepts petitioner's presentation of the above referenced portions of the brief.

QUESTION PRESENTED

While your respondent accepts the legal substance of the Question Presented as posed by the petitioner,

serious issue is taken with the descriptive phrases, "poorly educated, mentally abnormal".[1] The propriety of this description of the petitioner, insofar as it may enhance the question presented for review, is no doubt one of the key issues to be decided by the Court and respondent reserves the right to present argument, *infra,* concerning the description's accuracy and impact.

STATEMENT OF THE CASE

Pursuant to Rule 40 of this Court, *supra,* respondent deems it necessary to set forth additional facts from the record of this case which are considered essential to the complete resolution of the issues presented for review.

A psychiatric report is part of the record (R. 6) and has been referred to by petitioner in his Statement of the Case.[2] The totality of this report is essential for an adequate determination of critical factual and background matters, and the report is therefore fully incorporated by reference into this Statement of the Case and reprinted verbatim in Appendix A, *infra.*

The psychiatrist quoted the petitioner as making the following statements:[3]

> "Don't worry. If I had wanted to rape you, I would have done it before. [R. 7]

---

[1] Brief of Petitioner, at 2.

[2] **Id.** at 3.

[3] These are in addition to those quoted responses to proverbs cited in petitioner's brief, **Id.** n. 1.

"You don't have to scream. I am not going to hurt you. [R. 7]

"I didn't know how to ask her for forgiveness. [R. 7]

"I never could get adjusted to her. [R. 8]"

The psychiatrist sets forth in detail Miranda's experience with law enforcement agencies.[4] (R. 8)

Petitioner made a written statement concerning the events in question (State's Exhibit 1; R. 41, 69). Petitioner makes selected references to the statement.[5] Respondent incorporates the whole of this written instrument into this brief; it is reprinted herein as Appendix B, *infra*.

A portion of the statement was typewritten and part of it was written in long-hand by the petitioner himself (R. 40, 41). The following portion of the statement was actually written by the petitioner in his own hand:

"E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did

---

[4] 1) Aged 14, Stolen Car, Probation.
2) Three weeks later, Fort Grant (Arizona Industrial School for Boys), 6 months.
3) Assault and Attempted Rape, 1 year sentence.
4) Aged 17, Peeping Tom charge, Los Angeles, Probation.
5) Arrested twice, Los Angeles, Suspicion of Armed Robbery.
6) Military service, Peeping Tom charge, confinement and Undesirable Discharge.
7) December 1959, Dwyer Act Violation, Federal Penitentiary.

[5] Brief of Petitioner, n. 3.

could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M." (R. 69)

Finally, petitioner cites the Court to the opinion of the Arizona Supreme Court (R. 72-93), but once again is selective in the portions set forth in the Statement of the Case.[6] Acting on the assumption that petitioner considered the selected portions of the opinion "all that is material to the consideration of the Questions Presented",[7] the respondent must expand this Statement of the Case to include the whole of the opinion below of the Arizona Supreme Court (98 Ariz. 18, 401 P. 2d 721) and hereby incorporates the whole of the opinion herein by reference.

The following specific excerpts, at a minimum, are vital for a determination of the factual and legal predicate of the Arizona Court in its resolution of the Federal Constitutional Question:

> "The question of whether the investigation had focused on the accused at the time of the making of the statement and thereby shifted 'from investigatory to accusatory' is not the deciding factor in regard to the admissibility of the confession in the instant case. There are other factors under the ruling of the Escobedo case. Defendant in the instant case was advised of his rights. He had not requested counsel, and had not been denied assistance of counsel. We further call attention to the fact that, as

---

[6] Id. at 5-6.

[7] Rule 40, Subd. 1 (e), Supreme Court Rules, 28 U.S.C., Rules, as amended.

pointed out in the companion case here on appeal, State v. Miranda, No. 1397 [98 Ariz. 11, 401 P. 2d 716] defendant had a record which indicated he was not without courtroom experience. [Citation omitted] It included being arrested in California on suspicion of armed robbery, and a conviction and sentence in Tennessee on violations of the Dwyer [sic] Act. Under the circumstances he was certainly not unfamiliar with legal proceedings and his rights in court. The police testified they had informed defendant of his rights, and he stated in his written confession that he understood his rights (which would certainly include his right to counsel), and it is not for this court to dispute his statement that he did. His experience under previous cases would indicate that his statement that he understood his rights was true. (R. 88-89)

* * *

"What is the purpose of the right to counsel? What is the purpose of the Sixth and Fourteenth Amendments? Without question it is to protect individual rights which we cherish, but there must be a balance between the competing interests of society and the rights of the individual. Society has the right of protection against those who roam the streets for the purpose of violating the law, but that protection must not be at the expense of the rights of the individual guaranteed under the Sixth and Fourteenth Amendments to our Constitution. (R. 91-92)

* * *

"It will be noted in the discussion of these cases—particularly the Escobedo case—the ruling of the court is based upon the circumstances of the particular case. The court, in making its holding in the Escobedo case, stated 'under the circumstances here the accused must be permitted to consult with his lawyer.'

"Most of the cases distinguished the Escobedo case on the grounds that the defendant requested and was denied the right to counsel during interrogation. The Escobedo case merely points out factors under which —if all exist—it would not be admissible. We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of the defendant.

"Each case must largely turn upon its own facts, and the court must examine all the circumstances surrounding the taking of the statement in determining whether it is voluntary and whether defendant's constitutional rights have been violated.

"The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise of immunity were made; and that he understood his legal rights and the statement might be used against him. Under such facts and circumstances we hold that, notwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence." (R. 92-93)

SUMMARY OF ARGUMENT

Petitioner was in no way denied his constitutional right to counsel in this case. He neither merits, nor is he reason for, the pronouncement of the broad constitutional principle which is sought.

Petitioner received a full elementary education and, although he had an emotional illness, he had sufficient mentality and emotional stability to understand what

he was doing when he was doing it, and to fully appreciate all the potential consequences of his act.

Clearly there was no police brutality or any possible official overreaching in the acquisition of the statements here in question. Yet petitioner, nonetheless, portrays the police generally in the worst possible light, in attempting to justify the need for the rule he seeks. The examples of bad police activity represent the exceptions to the general rule as regards police conduct and attitude, and do not merit or require an overly broad constitutional rule which would strike down the good with the bad.

Petitioner infers that since he stood no chance of victory in the trial of the case after the statements were given, he was therefore deprived of some right. Nothing could be further from the truth. He has no such right to "win". The Constitution insures that he must not be convicted as a result of any violations of those rights which we all cherish; it doesn't insure that he won't be convicted.

The decision of the Arizona Supreme Court below rested on many factors, of which the lack of a request for counsel was but one. It determined that the totality of these factors did not result in affirmative conduct which denied petitioner his right to counsel. There was no element of waiver involved in the Arizona Court's decision.

The decision of this Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964) does not require the reversal of this case. The facts are significantly different. The legal

principles therein announced, considered within the context of that decision as it discusses not only the particular facts of the case but also the significance of the prior decisions of this Court on the same subject matter, implement an exclusionary rule directed to deter the police from affirmative conduct calculated, under the facts of any given case, to deny an accused from consulting with counsel. Such a rule, in proper perspective and balance, will protect the accused from any infringement of his right to counsel, while not unduly or unnecessarily curtailing the oft times essential investigative questioning of a suspect.

ARGUMENT

I

INTRODUCTION

Petitioner states that his life for all practical purposes was over when he walked out of Interrogation Room #2 on March 13, 1963.[8] The real fact is that Miranda's life was unalterably destined ten days earlier during the late evening hours of March 2 and the early morning hours of March 3, when he kidnapped and raped his victim, Patricia Wier. What followed must not be described in cynical terms as "the ceremonies of the law";[9] they were, and are, the carefully ordained processes of our judicial system, designed, at the optimum, to discover the truth, mete out justice to all, insure the guilty their just and proper recompense and vindicate the innocent. To be sure,

---

[8] Brief of Petitioner, at 10.

[9] Ibid.

thoroughly interwoven into these processes at all stages and levels is the implementation and zealous protection of those cherished rights and privileges guaranteed to all by the Constitutions of the United States and the several states; no police officer, prosecutor or judge dedicated to the basic precepts of our system of government advocates that it should be any different.

Unfortunately, or perhaps fortunately, so long as human beings rather than computers administer the processes of justice, mistakes and error will occur and injustices will be done. The courts of our land, including this Court with its highest and most final jurisdiction, are daily exposing and correcting these mistakes to the best of their ability. The question here before the Court is whether there was such a mistake or error in this case of a dimension to result in the denial of petitioner's right to counsel as set down in the Constitution of the United States, and as proclaimed by this Court in its decisions thereunder.

II

THERE ARE NO INHERENT DEFECTS EITHER IN THIS DEFENDANT, THE OPERATION OF LAW ENFORCEMENT AGENCIES, OR IN OUR SYSTEM OF CRIMINAL JUSTICE, WHICH REQUIRE A RULE OF THE CONSTITUTIONAL IMPACT AND PROPORTIONS HERE SOUGHT BY PETITIONER.

A. THE DEFENDANT.

The very description of the petitioner in his Question Presented[10] subtlely introduces a factual issue into

---

[10] **Id.** at 2.

this case which is of the gravest importance in resolving the ultimate legal question.

The words so carefully used were "poorly educated, mentally abnormal". No doubt other descriptive words and phrases could have been added—poor, motherless, unloved, downtrodden, culturally deprived, misguided, unguided, harassed, *ad infinitum.*

It is practically impossible to pick up a national magazine, professional journal, or listen to an address without some dramatice usage of these descriptive adjectives to characterize some greater or lesser portion of the American population.[11] And in the proper perspective, such attention, whether it be by this Court,[12] the Congress,[13] the executive,[14] or state and local governments,[15] is long overdue and, hopefully, will do something about the root-source of our most perplexing problems—not the least of which is the rising crime rate.[16]

However, to use these heart-rending descriptions in an attempt to justify or excuse the knowing and deliberate violation of our criminal statutes and the im-

---

[11] E.g. **Nine "Unadoptable" Children Joined by Love,** Look Magazine, Oct. 19, 1965, at 54; **Winters, Counsel for the Indigent Accused in Wisconsin,** 49 Marq. L. J. 1 (1965); Inaugural Address of President John F. Kennedy, January 20, 1961, 107 Congressional Record, 1013.

[12] E.g. **Brown v. Board of Education,** 347 U.S. 483 (1954).

[13] E.g. Public Works and Economic Development Act of 1965, 42 U.S.C. §§3121-3226.

[14] E.g. State of the Union Address, President Lyndon B. Johnson, January 12, 1966, 112 Congressional Record 129.

[15] E.g. Operation LEAP (Leadership and Education for the Advancement of Phoenix), Ordinance No. S-3205, Dec. 15, 1964, City Council of Phoenix, Arizona, Implementing Resolution No. 11887, November 4, 1964.

[16] E.g. Hoover, **Annual Report of the Federal Bureau of Investigation, Fiscal Year 1965,** U.S. Department of Justice.

position of violence and suffering and depravation upon some individuals of our society by others, is misleading to say the least. Of this ilk, Miranda is a clear example.

Perhaps an eighth grade education, under a literal definition of the term and in the context of our affluent society, is a "poor education". Under no stretch of the imagination, however, can Miranda be deemed to be uneducated or illiterate. In addition to his formal schooling, petitioner had considerable and varied experiences which broadened his knowledge, particularly in the area which is of primary importance to us now.[17]

Counsel would have us believe that petitioner was incapable of producing the statement which was admitted against him (Appendix B. *infra*).[18] A simple reading and viewing of the statement refutes such a contention. The portion of the statement describing the actual events of the incident is in petitioner's hand and was written by him. Certainly the officers, if they were interested in putting words into Miranda's mouth, could have typed in these words also, in a favorable context, and simply obtained Miranda's signature to the whole. And although petitioner's grammar, sentence structure and punctuation leave much to be desired, the conclusion is inescapable that his knowledge and understanding of the difference between simple promiscuity and the crime of rape is more highly sophisticated than most of the Ph.Ds in our country.[19]

---

[17] See n. 4, **supra**.

[18] Brief of Petitioner, n. 3.

[19] Note petitioner's careful use of the words "without force", "without force and with cooperation", "asked her to lay down, and she did". Appendix B, **infra.** See also petitioner's quoted sentence responses, statement of the case, **supra,** at 2.

Miranda is also labeled as "mentally abnormal". The basis for this is the psychiatric report (Appendix A, *infra*). While Miranda had an "emotional illness", it is questionable that this even made him "abnormal".[20] Clearly the diagnosis of the psychiatrist was to the effect that the illness was not disabling and that Miranda was able to understand the predicament he was in and knew the conduct society demanded of him at the time he chose to ignore those demands.[21]

B. THE POLICE

Admittedly there is no possible element of police brutality or coercion in this case, whether direct or subtle.[22] Yet petitioner, nevertheless, paints a picture of police disregard for rights guaranteed by our Constitution. The picture is inaccurate—but proving it so is almost a practical impossibility.

The articles, the studies, and the cases,[23] dealing, as they almost unanimously do, with the negative aspect of the problem, make it difficult to see the rule because of the emphasis on the exception. It is true that all

---

[20] It has been estimated that at least 10% of our entire population have emotional illnesses of one type or another which should be treated professionally. Milt, **How to Deal With Mental Problems,** (National Asociation for Mental Health, Booklet, 1962).

[21] "It is my opinion that Mr. Mirande [sic] is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande [sic] has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong." Appendix A, **infra.**

[22] Brief of Petitioner, at 10.

[23] E.g. LaFave, **Detention for Investigation by the Police: An Analysis of Current Practices,** 1962 Wash. U.L.Q. 331;

Smith, **Police Systems in the United States,** (2d rev.ed. 1960); **Ashcraft v. Tennessee,** 322 U.S. 143 (1944).

police officers are not interested in protecting the rights of the accused; it is true that there are convictions obtained by use of trumped-up evidence and wrongfully elicited incriminating statements and confessions; but these are the very few exceptions to the general rule. For every case of police insensitivity to individual rights, there are literally thousands of unreported incidents of the unstinting efforts of police and prosecutors which result in the extrication of an otherwise helpless and innocent victim, hopelessly intertwined in a web of circumstantial evidence of guilt.[24] The prime reason the vast majority of such instances go unreported and unstatisticized, is that the police and the prosecutor alike consider this just another important, but routine part of their work, which they do with the same dedication as they do the more spectacular phases.[25]

---

[24] A person cannot talk to a police officer or prosecutor of many years tenure without hearing of numerous such incidents, many made possible by not only investigating extrinsic physical facts, but also by investigative questioning.

[25] The Law Enforcement Code of Ethics, as set forth in The Detroit Police Manual, and cited in Norris, **Constitutional Law Enforcement is effective Law Enforcement:** [Etc.], 43 U. Det. L. J. 203 (1965), n. 30, clearly reflects the importance of this particular responsibility, and represents the rule and not the exception:

"Law Enforcement Code of Ethics

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I will keep my private life unsullied as an example to all, maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officously or permit personal feelings, prejudices, animosities, or friendships to influence my decisions. With no com-

This Court, together with all the courts of our land, should and will continue to firmly and courageously deal with the exceptions to this rule. We must be careful, however, not to foreclose, limit or unduly hamper investigative techniques which, in their legitimate use, are not barred by any Constitutional mandate, solely because a few use the techniques to effect an unconstitutional result. The promulgation of such a rule of constitutional dimension in any given case would be as necessary as "Dr." Jerry Colona's recently suggested solution to Bob Hope's medical problem of a sore and infected big toe—to cut off Hope's head to relieve the execss weight on the toe.[26] While it goes without saying that the problem of the big toe would most certainly be forever solved, it is questionable whether the patient would be at all happy with the ancillary side effects of the treatment. As to whether a similarly undesirable side effect would be forthcoming from an unnecessarily broad constitutional rule in this case, we must look ahead.

C. THE NATURE OF THE CONTEST.

Petitioner, it seems, would have us interpret our adversary system of criminal justice as giving the ac-

---

promise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to hold so long as I am true to the ethics of police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession—Law Enforcement."

[26] Bob Hope Christmas Special, N.B.C. Television Network, January 26, 1966, 8:30 P.M., M.S.T.

cused a right to "win" the contest.[27] While it may be inherent in the very nature of our system, with its vital and essential safeguards to individual freedom, that a person who actually commits a criminal act may have extra opportunities to escape punishment for his crime, it must be clear without comment or citation that the intent of the Constitutional safeguards were to insure, as much as humanly possible, that the innocent and unpopular would not be wrongfully harassed, intimidated or convicted—not that the guilty should have any special chances for acquittal or other favorable result.

If the prosecuting authorities have gained an overwhelming advantage over a particular defendant, assuming they have done so by proper methods, and not by violating any of his constitutional rights, this is to be highly commended, not condemned. It is a vital attribute of our society that the law enforcement machinery apprehend, convict and punish and/or rehabilitate those who would break the laws and endanger, if not destroy, our domestic tranquility. Law enforcement is not a game of chance, *Massiah v. United States*, 377 U.S. 201, 213 (1964) (Dissenting Opinion); *McGuire v. United States*, 273 U.S. 95 (1927). There is no "gamesmanship" or "sportsmanship" involved here, at least insofar as the criminal is concerned. He follows no code of conduct or canons of ethics. The death, suffering, and depravation caused by crime is as real to those who are touched by its sting as is that of any war ever fought. Certainly the criminal gives no quarter; and none should be given in return except as is required to insure the integrity and continuation of the system which we all cherish.

---

[27] Brief of Petitioner, at 9.

Criminals, like the rest of us, are inherently unequal. Some are skilled, some not; some intelligent, some not; some trained, some not; some blabbermouths, some not; some strong, some not; some cruel, some not, etc. It certainly would not be urged that if a criminal is foolish enough to leave physical clues, the police should not be allowed to use them because X, who committed the same crime, was more careful. Or if Y was callous enough, or "intelligent" enough, to kill his rape victim to prevent identification, certainly Z, who also raped, should not be given the same opportunity to kill so as to have an equal chance at the trial to "win". So, too, are there differences between what happened to Ernesto A. Miranda as contrasted with what happened to Danny Escobedo[28] which militate in favor of a different resolution of their problem by this Court.

III

MIRANDA WAS NOT DENIED HIS RIGHT TO COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decision in this case must rest upon the scope and effect to be attributed to this Court's decision concerning right to counsel at the interrogation stage, in *Escobedo v. Illinois*, 378 U.S. 478 (1964). While petitioner's historical analysis is to be highly commended for the care and effort which it reflects, his almost cursory treatment of *Escobedo*, coupled as it is with an

---

[28] **Escobedo v. Illinois**, 378 U.S. 478 (1964).

inaccurate treatment of the Arizona Court's decision in the instant case, belies some doubt as to the absolute accuracy of the conclusion forecast as unassailable. Rather than obscuring the "simple lines of the situation",[29] the welter of the cases, the majority of which disagree with petitioner's conclusion,[30] coupled with the rather sharp divergence of opinion on this Court, not only in the recent decisions on this point, eg., *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois, supra,* but in the earlier decisions as well, e.g., *Crooker v. California,* 357 U.S. 433 (1958) and *Cicenia v. LaGay,* 357 U.S. 504 (1958), indicate the problem posed here to be anything but simple.

A. THE ARIZONA COURT'S DECISION.

Petitioner, at least twice,[31] states that the Arizona Supreme Court rested its opinion on petitioner's refusal to request counsel. A reading of the opinion clearly reveals that this was only one factor in many which resulted in a determination that Miranda was not denied his right to counsel (Statement of the Case, *supra,* at 4). The nature and length of the questioning, the warning advice given, and the background of the petitioner were equally important factors. Petitioner is correct in stating that the Arizona Court's decision did not in any way purport to rest on a waiver doctrine.[32] This is made amply clear in the Arizona

---

[29] Brief of Petitioner, at 28.

[30] For an exhaustive citation of the cases construing **Escobedo,** both on a State and Federal level, see: Sokol, **Brief of Amicus Curiae in The Escobedo Cases,** (The Michie Company, 1966).

[31] Brief of Petitioner, at 6, 30.

[32] **Id,** nn. 7 and 15.

Supreme Court's decision in *State v. Goff*, ...Ariz. ....., 407 P. 2d 55 (1965), where the court referred to this aspect of its decision in *Miranda*:

> "We did not conclude from Escobedo that the Supreme Court of the United States held that arbitrarily and in every instance admissions made to police officers after an investigation has become accusatory are inadmissible in evidence unless a suspect has knowingly waived his right to counsel." *Id*, 407 P. 2d at 57.

The Supreme Court of California, in *People v. Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and indeed the dissenting Justices of this Court in *Escobedo v. Illinois, supra*, 378 U.S. at 495, have forecast, as a minimum, a contrary conclusion. If this latter view is proved to be correct, that is the end of this case, and untold thousands like it throughout the length and breadth of this land. We choose, however, in turning our attention to *Escobedo*, to approach the import of that decision with the "hope" expressed by Justice Stewart in concluding his separate dissenting opinion in *Escobedo v. Illinois, Ibid.*

B. ESCOBEDO v. MIRANDA

Petitioner prefers to dwell on the implicit in *Escobedo*.[33] The explicit facts of the case are considered by respondent to be highly relevant and very crucial to the indicated result in Miranda.

---

[33] Id. at 30—in fact, it would appear, on the following page of his brief, that he relies perhaps more upon the guiding light of the California Supreme Court than the pronouncements of this Court.

Danny Escobedo had retained counsel and repeatedly requested to consult with him. The requests were all denied. Escobedo was even told at one time that his lawyer didn't want to see him. On the contrary, Escobedo's lawyer was trying desperately to see his client, and was thwarted at every turn by the police, in spite of a specific Illinois statute requiring the police to admit the lawyer. *Escobedo v. Illinois, supra,* 378 U.S. at 480. Escobedo had no record of previous experience with the police. He was interrogated not only by police officers, but by a skilled and experienced lawyer. Escobedo was told that another suspect had pointed the finger at him as the guilty one. At no time was he ever advised of his constitutional rights by either the police or the prosecutor.

Ernesto A. Miranda was not represented by counsel at the time of the questioning here involved. He had not requested that counsel be provided, or that he be given an opportunity to consult with counsel prior to talking to the police. The officers did not deny him an opportunity to consult with counsel, nor did they in any way use chicanery in their questioning of Miranda. Petitioner had had considerable and varied experience with the police on previous occasions. Petitioner was advised of his constitutional rights, specifically including his right to remain silent, the fact that his statement had to be voluntary, and that anything he did say could be used against him.[34]

In setting forth the holding of the case, this Court very carefully enumerated the factors which resulted in the denial of counsel to *Escobedo*:

---

[34] It is not here disputed that petitioner was not specifically advised of his right to counsel.

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied counsel, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the states by the Fourteenth Amendment', *Gideon v. Wainright,* 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." *Escobedo v. Illinois, supra,* 378 U.S. at 490 and 491.

Of the five specific elements, which might be set forth as: (1) Accusatory Stage; (2) Police Custody; (3) Interrogation to elicit incriminating statements; (4) Request and Denial of an opportunity to consult counsel; and (5) Effective Warning of his absolute right to remain silent, petitioner contends that only (4) is absent here and that its absence is not crucial. Both premises are incorrect.

The Arizona Court clearly considered that Miranda had been warned of his absolute right to remain silent. The facts cited in that opinion, together with the Appendix to Petitioner's Brief, provided an ample basis for such a conclusion. And to discount item (4) concerning the request, is to completely ignore not only the plain wording of the opinion in *Escobedo*, but to completely disregard the factual and legal bases for the opinions cited in petitioner's historical analysis as

demanding the ultimate ruling sought herein. E.g., *Crooker v. California, supra,* (Douglas, J., dissenting):[35] *Spano v. New York*, 360 U.S. 315, 325 (1959), (Douglas, J., concurring).[36] The court lays a great stress on this factor, together with the failure of the police to warn the accused of his absolute right to remain silent. *Escobedo v. Illinois, supra,* 378 U.S. at 479, 480, 481, 482, 485, 486, 491, 492.

There are two other matters in the opinion itself which militate against petitioner's sought-for rule being all but announced. They are: (1) The treatment accorded the prior decisions of this Court in *Crooker v. California, supra,* 357 U.S. 433 and *Cicenia v. LaGay, supra* 357 U.S. 504, and (2) The Court's special and clear emphasis of the request for and denial of counsel in spite of its recent restatement that the right to counsel did not depend upon a formal request, *Carnley v. Cochran,* 369 U.S. 506 (1962).

Instead of completely overruling *Crooker* and *Cicenia,* the Court noted that the holding itself in *Crooker,* on the distinguishable facts in that case, which were set forth in some detail (*Escobedo v. Illinois, supra,* 378 U.S. at 491, 492), would possibly have been the same under the principles announced in *Escobedo.* In implicity accepting the result in *Crooker,* while discarding the language inconsistent with the principles

---

[35] "This demand for an attorney was made over and again prior to the time a confession was extracted from the accused. Its denial was in my view a denial of that due process of law guaranteed the citizen by the Fourteenth Amendment." 357 U.S. at 442.

[36] "The question is whether after the indictment and before the trial the Government can interrogate the accused **in secret** when he asked for his lawyer and when his request was denied." 360 U.S. at 325. (Emphasis in original)

of *Escobedo,* the Court specifically approves the rejection of the absolute rule sought by *Crooker*:

> "That 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case*'." *Id,* at 491. (Emphasis in *Crooker*).

The continued rejection of the absolute rule sought by *Crooker,* implying as it does that in some cases a state could even deny a request without denying an accused his constitutional right to counsel, clearly rejects, *a fortiori,* the absolute rule sought by petitioner.

This result is also pointed to by the inclusion and emphasis of the request for counsel as a vital factor in *Escobedo* while not even including a reference to this Court's recent reemphasis of the unimportance of a request for counsel in the implementation of the absolute right to be provided counsel in *Carnley v. Cochran, supra,* 369 U.S. 506. The ommission of reference to *Carnley* must be considered to have been by design and not accident. Thus the scope of the rule, and the force of its emphasis, must be and is different.

The decision in *Escobedo* announces an exclusionary rule directed against the affirmative conduct of police and prosecutors calculated to deny to an accused his right to counsel. Any incriminating statements received thereafter, regardless of the fact that they are clearly the product of the free and uncoerced will of the accused, are inadmissible, *Escobedo v. Illinois, supra,* 378 U.S. at 491. The decision in *Massiah v. United States, supra,* 377 U. S. 201, although involving a fed-

eral prosecution, certainly reinforces this view of the *Escobedo* doctrine, particularly the last two paragraphs thereof.[37]

The rule announced is a parallel to that announced in *Mapp v. Ohio,* 367 U.S. 643 (1961), designed as a specific deterrent to police activity calculated to render meaningless the citizen's rights under the search and seizure provision of the Fourth Amendment to the Federal Constitution. It must also be applied with the same practical, non-technical, common sense approach as is the *Mapp* exclusionary rule. *United States v. Ventresca,* 380 U.S. 102 (1965).

A contrary application would result in attempting to make police officers part-time defense counsel and part-time magistrates, or deprive them completely of an investigative technique which, in its proper use and

---

[37] "The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the government agents were completely 'justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.'

"We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against **him** at his trial." **Massiah v. United States,** 377 U.S. at pages 206 and 207. (Emphasis in original).

application, is as invaluable as any modern, scientific tool for the detection and prevention of crime.

The legal scholars and commentators have produced volumes of material on *Escobedo*.[38] It ranges the complete spectrum, from law professors and lawyers[39] to second and third year law students.[40] Both poles of the controversy are forcefully presented, including extensive citations to both primary and secondary authority, in the very recent publication of the University Press of Virginia: Kamisar, Inbau, and Arnold, *Criminal Justice in Our Time,* (Magna Carta Essays, Howard ed. 1965).

Ultimately, however, neither the overwhelming weight of the writings of the commentators, nor the weight of the decisions of the Judges and Justices of the other appellate tribunals of our land, whether state or federal, can dictate or necessarily foreshadow this Court's determination of the scope and effect of the principles announced in *Escobedo.*

If the rule sought by petitioner is forthcoming, we can only re-echo the ominous warnings and misgivings of the dissenters in *Massiah* and *Escobedo, supra.* Miranda and Escobedo are not equal and there is no Con-

---

[38] For an exhaustive collection of citations see: **Sokol, Brief of Amicus Curiae in the Escobedo Cases, supra,** n. 29.

[39] E.g. Sutherland, **Crime and Confession,** 79 Harv. L. Rev. 21 (1965); Dowling, **Escobedo and Beyond,** 56 J. Crim. L., C.&P.S., 143 (1965); Herman, **The Supreme Court and Restrictions on Police Interrogation,** 25 Ohio St. L.J. 449 (1964).

[40] E.g. Comment, **Escobedo v. Illinois,** 25 Md. L. Rev. 165 (1965); Comment, **Right to Counsel During Police Interrogation, The Aftermath of Escobedo,** 53 Calif. L. Rev. 337 (1965); Note, **Escobedo in the courts, May Anything You Say Be Held Against You,** 19 Rutgers L. Rev. 111 (1964).

stitutional reason for this Court to equate them in the manner sought by petitioner, any more than there would be for this Court to balance their skill in committing and concealing their crime. No amount of scientific advancements in crime detection will produce evidence which a clever criminal has not been foolish enough to provide for discovery. If a criminal has been clever in the commission of his crime, but is foolish or careless in his handling of the police interrogation of him concerning that crime, the evidence obtained as a result of the only honest investigative avenue left open to the law enforcement agency, should not be suppressed unless that evidence is determined not to be the product of the free and uncoerced will of the accused, or if it is obtained after the police have undertaken a course of conduct calculated to deny the accused his right to counsel. Certainly nothing less will be tolerated, but the United States Constitution requires no more.

CONCLUSION

Quite appropriately, Justice Goldberg, who authored *Escobedo v. Illinois, supra,* provides the words most appropriate to conclude this brief. Speaking for the Court in *United States v. Ventresca, supra,* 380 U.S. 102, he said:

> "This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. [Presumably, for purposes of this case, confessions and admissions may be substituted for the final phrase concerning searches and seizures] [Citations omitted.] By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires.
>
> * * *
>
> "*It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community.*" *Id,* at 111 and 112. (Emphasis added).

The officers in this case also acted within the constitutional standards, and it is equally vital that their actions be sustained.

The judgment and decision of the Arizona Supreme Court in this case below should be affirmed.

Respectfully submitted,

DARREL F. SMITH,
The Attorney General of Arizona,

GARY K. NELSON,
Assistant Attorney General,
Rm. 159, State Capitol Bldg.,
Phoenix, Arizona 85007,

Attorneys for Respondent.

GARY K. NELSON,
Assistant Attorney General,
of Counsel

February, 1966

APPENDIX A

JAMES M. KILGORE, JR., M.D.
Suite 209
461 West Catalina Drive
Phoenix 13, Arizona

PSYCHIATRY

May 28, 1963

Honorable Warren L. McCarthy
Judge of the Superior Court
Maricopa County
Court House
Phoenix, Arizona

MIRANDE, Ernest Arthur
Criminal Cause #41947, #41948

Ernest Arthur Mirande is a 23-year-old Mexican male who was examined by me in the County Jail on May 26, 1963.

Mr. Mirande is charged with the offense of robbery in relation to one Barbara Sue McDaniel on November 27, 1962. Mr. Mirande states that on that evening approximately 9:30 p.m. he saw a lady go to her car in the parking lot alone. He approached the car and got in the front seat. He stated at the time that he didn't know whether he would rob or rape the lady. She asked him if he didn't want to go to her apartment. Mr. Mirande stated that this frightened him in that she was so eager for sex and decided at that point to ask for money which she readily gave to him. He then said, "Don't worry. If I had wanted to rape you, I would have done it before."

The second offense for which Mr. Mirande is charged occurred on March 3, 1963, at which time he is supposed to have kidnapped and raped Patricia Ann Weir. Mr. Mirande stated that he knew Patricia Ann Weir, an 18-year-old single girl who worked in the theater. He had occasionally seen her there and on the evening of March 3 at approximately 11:00 p.m. he saw her walking toward the bus stop. He drove ahead of the bus and when she got off close to her home he was waiting for her. As she came close to the car he said to her, "You don't have to scream. I am not going to hurt you." He then told her to get into the car, which she did, and they drove out into the desert. He asked her to remove her clothing, which she did without resistance. He removed his clothes and performed the act of sexual intercourse. Miss Wir, according to the patient, did not resist, but during the process of sexual relations was tearful. Mr. Mirande was somewhat upset when he learned that the girl had not previously had sexual relations. He stated that if at any time the girl had refused or resisted, that he would not have proceeded. He then took her within a block or two of her house where he let her out. He asked if she would "tell on me." The girl did not respond. He stated "I didn't know how to ask her for forgiveness."

Mr. Mirande is age 23 and he has a common-law wife, age 30. They have been living together since August, 1961. His wife has two children by her first husband, a son, 11, and a daughter, 10. Mr. Mirande and his wife have a daughter, 9-½ months of age. He has worked as a truck driver and also as a worker in a warehouse. Mr. Mirande's father is age 55 and works as a painter in Mesa. He stated that he did not get

along with his father during his adolescent years and was frequently beaten up by his father when he got into trouble. Mr. Mirande's mother died in 1946 at the age of 34 when Mr. Mirande was six years of age. He was reared by his step-mother, age unknown. He stated with reference to her, "I never could get adjusted to her." Mr. Mirande completed half of the ninth grade at the age of 15. Mr. Mirande was first placed on probation at the age of 14 after having stolen a car. Three months later he was sent to Fort Grant for a period of six months. Shortly after returning he was sentenced for a year on an attempted rape and assault charge. According to Mr. Mirande's description of this incident, he was walking by a home in which he saw a lady lying in bed with no clothes on. He went up to the front door and it was open; he entered the home and crawled in bed with the woman. Her husband returned home shortly and the police were called. In 1957 at the age of 17 Mr. Mirande was picked up in Los Angeles for being a peeping tom and charged with lack of supervision and was placed on probation. He was also arrested twice in L.A. on suspicion of armed robbery. He was in the Army from April, 1958, to July, 1959. He was placed in the brig for being a peeping tom and given an undesirable discharge. In December, 1959, he was sentenced to the Federal Penitentiary for transporting a stolen automobile across state lines.

Mr. Mirande is a 23-year-old Mexican man who is alert and oriented as to time, place, and person. His general knowledge and information is estimated to be within normal limits as is his intelligence. He is emotionally bland, showing little if any effect. He is shy, somewhat withdrawn. He tends to be somewhat hypo-

active. The patient's responses to proverbs are autistic and somewhat bizarre; for example, to the proverb "a rolling stone gathers no moss", the patient interpreted this to mean "If you don't have sex with a woman, she can't get pregant." To the proverb "a stitch in time saves nine", Mr. Mirande's response is "If you try to shut something in, you keep it from going out." To the proverb "people in glass houses shouldn't throw stones", Mr. Mirande states "A person with one woman shouldn't go to another women." Mr. Mirande states that he is not particularly concerned about himself at this point or the trouble that he is in except in that it might interfere with his looking after his wife and child.

It is my diagnostic impression that Mr. Mirande has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type.

It is my opinion that Mr. Mirande is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong.

/s/ James M. Kilgore, Jr.

JAMES M. KILGORE, JR., M.D.

JMK/db

APPENDIX B

STATE'S EXHIBIT 1

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

Form 2000-66-D
Rev. Nov. 59

Witness/Suspect
Statement

SUBJECT: Rape D.R. 63-08380

STATEMENT OF: Ernest Arthur Miranda

TAKEN BY: C. Cooley #413—W. Young #182

DATE: 3-13-63 Time: 1.30 P.M.

PLACE TAKEN: Interr Rm #2

I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

I, Ernest A. Miranda, am 23 years of age and have completed the 8th grade in school.

E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with

cooperation. Asked her to lay down and she did could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M.

I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ Ernest A. Miranda

WITNESS /s/ Carroll Cooley

Wilfred M. Young #182

FILED
FEB 2 3 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 759. ERNESTO A. MIRANDA *v.* ARIZONA.

No. 760. MICHAEL VIGNERA *v.* NEW YORK.

No. 761. CARL CALVIN WESTOVER *v.* UNITED STATES.

No. 762. SYLVESTER JOHNSON and STANLEY CASSIDY *v.* NEW JERSEY.

No. 584. CALIFORNIA *v.* ROY ALLEN STEWART.

BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORY OF THE VIRGIN ISLANDS, AS *AMICI CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
80 Centre Street
New York, New York 10013

TELFORD TAYLOR
Special Counsel for the
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
BARRY MAHONEY
GEORGE D. ZUCKERMAN
Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

PAGE

Interest of the *Amici* 2

Questions Presented 3

Summary of Argument 4

Argument 7

I—The Court should not presently enlarge the constitutional dimension of pre-arraignment rights to the assistance of counsel 8

A. Elements of the constitutional issue 12

B. Historical factors and established practice .. 15

C. The materials of decision 18

D. Available empirical evidence is insufficient for projecting and evaluating the consequences of adopting the exclusionary rules proposed in these cases 21

(1) The importance of pre-arraignment questioning in law enforcement 24

(2) Effect of the presence of counsel on pre-arraignment interrogation 28

E. Variety and imprecision of proposals to extend the right to counsel to pre-arraignment interrogation 30

F. Importance of non-constitutional decisional sources 35

II—New exclusionary rules limiting the admissibility of pre-arraignment statements should not be applied retroactively 39

PAGE

A. The state judicial systems and state law enforcement officials have justifiably placed great reliance on past decisions of this Court establishing voluntariness as the sole criterion for admissibility of a pre-arraignment statement 39

B. The purposes of a new exclusionary rule would not be served by retroactive application 42

(1) Deterrence 42

(2) Protection of the innocent 43

(3) The integrity of the judicial system 44

C. Retroactive application of a new exclusionary rule would place overwhelming burdens on the administration of justice by the states 45

(1) A great number of cases would have to be reopened, and a large number of persons—particularly those under long sentences, for serious crimes—would inevitably be released from custody 45

(2) Retroactive application of a new rule would impair the future development of progressive solutions to the difficult problems of criminal procedure 47

(3) Retroactivity of a new exclusionary rule would impair the ability of the state judicial systems to provide post-conviction relief for those individuals whose present incarceration truly amounts to "intolerable restraint" 49

Conclusion 52

CASES

	PAGE
Adamson v. California, 332 U. S. 46 (1947)	7
Anderson v. State, 237 Md. 45, 205 A. 2d 281 (1964)	9
Bean v. State, 398 P. 2d 251 (Nev. 1965)	9
Blackburn v. Alabama, 361 U. S. 199 (1960)	8
Matter of Bojinoff v. People, 299 N. Y. 145 (1949) ..	48
Bram v. United States, 168 U. S. 532 (1897)	8, 43
Brown v. Allen, 344 U. S. 443 (1953)	41
Browne v. State, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964), *cert. denied*, 379 U. S. 1004 (1965)	9
Campbell v. State, 384 S. W. 2d 4 (Tenn. 1964)	9
Case v. Nebraska, 381 U. S. 336 (1965) 49, 51	
Chandler v. Fretag, 348 U. S. 3 (1954)	13
Cicenia v. Lagay, 357 U. S. 504 (1957) 5, 24, 28	
Collins v. Beto, 348 F. 2d 823 (5th Cir. 1965)	9, 16
Commonwealth *ex rel.* Linde v. Maroney, 416 Pa. 331, 206 A. 2d 288 (1965)	9
Commonwealth v. McCarthy, 200 N. E. 2d 264 (Mass. 1964)	9
Commonwealth v. Negri, 213 A. 2d 670 (Pa. 1965) ...	9, 22
Crooker v. California, 357 U. S. 433 (1958) 6, 24, 41	
Culombe v. Connecticut, 367 U. S. 568 (1961) ...8, 25, 28, 41	
Davis v. North Carolina, 339 F. 2d 770 (4th Cir. 1965), cert. granted, —— U. S. ——, 86 S. Ct. 438 (Dec. 13, 1965), (No. 815, Oct. Term, 1965) ..10, 11	
Douglas v. California, 372 U. S. 356 (1963)	50
Elkins v. United States, 364 U. S. 206 (1960)	21
Escobedo v. Illinois, 378 U. S. 478 (1964) ..4, 5, 6, 9, 10, 11, 24, 31, 38, 40, 42, 47	
Eskridge v. Washington, 357 U. S. 214 (1958)	50

PAGE

Fay v. Noia, 372 U. S. 391 (1963) 6, 44, 50
Galarza Cruz v. Delgado, 233 F. Supp. 944 (D.P.R. 1964) 9
Gallegos v. Nebraska, 342 U. S. 55 (1951) 41
Gideon v. Wainwright, 372 U. S. 335 (1963) 10, 14, 17 21, 50
Griffin v. California, 380 U. S. 609 (1965) 22, 43, 44, 50
Griswold v. Connecticut, 381 U. S. 479 (1965) 13
Hamilton v. Alabama, 368 U. S. 52 (1961) 14
Haynes v. Washington, 373 U. S. 503 (1963) ..5, 8, 24, 28, 41
In re Lopez, 42 Cal. Reptr. 188, 398 P. 2d 380 (1965) 48
Irwin v. Dowd, 359 U. S. 394 (1959) 50
Jackson v. Denno, 378 U. S. 368 (1964) 20, 43, 50
Jackson v. United States, 337 F. 2d 136 (D. C. Cir. 1964) 9
Johnson v. Zerbst, 304 U. S. 458 (1937) 17
Ker v. California, 374 U. S. 23 (1963) 13
Linkletter v. Walker, 381 U. S. 618 (1964) ..5, 26, 40, 41, 42, 43, 45, 47, 50
Lynum v. Illinois, 372 U. S. 528 (1963) 8
Mallory v. United States, 354 U. S. 449 (1957) 11
Mapp v. Ohio, 367 U. S. 643 (1963) 21, 46, 48
Massiah v. United States, 377 U. S. 201 (1964) 13, 46
McNabb v. United States, 318 U. S. 332 (1943) 11
Mooney v. Holohan, 294 U. S. 102 (1935) 50
Moore v. Dempsey, 261 U. S. 86 (1923) 50
People v. Dash, 16 N. Y. 2d 493 (1965) 48
People v. Di Biasi, 7 N. Y. 2d 544 (1960) 38, 48
People v. Donovan, 13 N. Y. 2d 148 (1963) 38, 48

PAGE

People v. Dorado, 42 Cal. Reptr., 169, 398 P. 2d 361 (1965) 9, 22, 33, 42, 48
People v. Gunner, 15 N. Y. 2d 226 (1965) 39
People v. Friedlander, 16 N. Y. 2d 48 (1965) 39
People v. Hartgraves, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), cert. denied, 380 U. S. 961 9
People v. Howard, 12 N. Y. 2d 65 (1962), cert. denied, 374 U. S. 840 (1963) 48
People v. Huntley, 15 N. Y. 2d 72 (1965) 43
People v. Meyer, 11 N. Y. 2d 162 (1962) 38, 46
People v. Neely, 395 P. 2d 557 (Oregon 1964) 21
People v. Rodriguez, 11 N. Y. 2d 279 (1962) 47
People v. Waterman, 9 N. Y. 2d 561 (1961) 47
Pointer v. Texas, 380 U. S. 700, 411 (1965) 45
Powell v. Alamaba, 287 U. S. 45 (1932) 17
Reck v. Pate, 367 U. S. 443 (1961) 6, 44, 48
Spano v. New York, 360 U. S. 315 (1959) ..... S
State v. Dufour, 206 A. 2d 82 (R. I. 1965) 9, 22, 33
State v. Fox, 131 N. W. 2d 684 (Iowa 1964) 9
State v. Hall, 397 P. 2d 261 (Idaho 1964) 9
State v. Johnson, 206 A. 2d 737 (1965) 43
State v. Kitashiro, 48 Hawaii 204, 397 P. 2d 558 (1964) 9
State v. Miranda, 98 Ariz. 18, 401 P. 2d 721 (1965), cert. granted, 86 Sup. Ct. 320 9
State v. Neely, 239 Ore. 487, 398 P. 2d 482 (1965) ..9, 22, 33
State v. Sheridan, 96 N. W. 730 (Ia. 1903) 21
State v. Smith, 43 N. J. 67, 202 A. 2d 669 (1964), cert. denied, 379 U. S. 1005 9
State v. Worley, 178 Neb. 232, 132 N. W. 2d 764 (1965) 9
Stroble v. California, 343 U. S. 181, 196-198 (1952)

PAGE

Tehan, v. Shott, —— U. S. ——, 34 U.S.L. Week 4095 (1965) 5, 40, 41, 42, 43, 45

Trop v. Dulles, 356 U. S. 86 (1958) 19

United States ex rel. Angelet v. Fay, 381 U. S. 65 (1965) 45, 48

United States ex rel. Russo v. New Jersey, 351 F. 2d 429 (3rd Cir. 1965) 9, 22, 33, 34

United States *ex rel.* Walden v. Pate, 350 F. 2d 240 (7th Cir. 1965) 9

United States v. Cone, ——F. 2d —— (2d Cir., dec'd Nov. 22, 1965; Slip Op. p. 3391) 9, 15, 32

United States v. Drummond, —— F. 2d —— (2d Cir., Dec. 2, 1965; Slip. Op. p. 3425) 9, 37

United States v. Sobell, 314 F. 2d 314 (2 Cir.), cert. denied, 374 U. S. 857 (1963) 47

Wansley v. Commonwealth, 205 Va. 412, 137 S. E. 2d 865 (1964), cert. denied, 380 U. S. 922 9

Watts v. Indiana, 338 U. S. 49 (1949) 18, 25, 29

Weeks v. United States, 232 U. S. 283 (1914) 21

Weems v. United States, 217 U. S. 349 (1910) 19

White v. Maryland, 373 U. S. 59 (1963) 14

Wolf v. Colorado, 338 U. S. 25 (1949) 21, 40

Wright v. Dickson, 336 F. 2d 878 (9th Cir. 1964) 9

Constitutional and Statutory Authorities

United States Constitution:

Fifth Amendment 34

Sixth Amendment 4, 9, 13, 15, 31

Eighth Amendment 19

Fourteenth Amendment 13, 19

Federal Statutes:

PAGE

28 United States Code § 2241 49
28 United States Code § 2254 49
28 United States Code § 2255 49

State Statutes:

N. Y. Laws of 1965, c. 878 ..... 2, 3
N. Y. Executive Law § 63 2
Texas Code Cr. Proc. Art. 727 22

MISCELLANEOUS

Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U.L. Rev. 67 (1963) 24

Barrett, *Police Practices and the Law—From Arrest to Release or Charge,* 50 Calif. L. Rev. 11 (1962) 26

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441 (1963) 47, 50

Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions,* 66 Col. L. Rev. 62 (1966) 26, 36

Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955) 16

Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure,* 56 Jour. Crim. Law, Criminology & Police Science 156 (1965) 9

Enker & Elson, *Counsel for the Suspect: Massiah* v. *United States* and *Escobedo* v. *Illinois,* 49 Minn. L. Rev. 47 (1964) 9

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding,* 2 Stan. L. Rev. 5 (1949) 7

Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929 (1965) . .9, 15, 16, 37, 38

PAGE

Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* in CRIMINAL JUSTICE IN OUR TIME (U. Va. Press 1965) .. 9, 22

LaFave, ARREST, 319-341 (1965) 26

Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965) 50

10 N. Y. Judicial Conference Annual Report (1965) 2

Paulsen, *Pre-Trial Release in the United States*, 66 Col. L. Rev. 109 (1966) 24

Proceedings and Interim Report of the National Conference on Bail and Criminal Justice (1965) 24

Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964) 24

Resolution XIV, *Post-Conviction Remedies*, National Association of Attorneys General (1965) 51

Traynor, *Map* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-341 50

Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and The States*, 44 Boston Univ. L. Rev. 423 (1964).. 9

Wald, *Pretrial Detention and Ultimate Freedom*, 39 N.Y.U.L. Rev. 631 (1964) 24

Supreme Court of the United States

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

against

THE STATE OF ARIZONA,

Respondent.

No. 760

MICHAEL VIGNERA,

Petitioner,

against

NEW YORK,

Respondent.

No. 761

CARL CALVIN WESTOVER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

No. 762

SYLVESTER JOHNSON and STANLEY CASSIDY,

Petitioners,

against

NEW JERSEY,

Respondent.

No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

against

ROY ALLEN STEWART,

Respondent.

BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORY OF THE VIRGIN ISLANDS, AS *AMICI CURIAE*

Interest of the *Amici*

The petitions for certiorari in the above cases raise such questions as whether criminal suspects must be advised, prior to arraignment, of a right to be silent or of a right to have counsel; whether counsel must be furnished to suspects upon request, or even in the absence of request; whether pre-arraignment statements of an accused taken in the absence of counsel must be excluded at trial; and whether newly-established constitutional rules limiting the admissibility of statements made by a defendant prior to his arraignment must be applied retroactively.

The interest of the Attorney General of the State of New York in these questions is substantial. As the chief legal officer of the State of New York (N. Y. Executive Law § 63), the Attorney General is concerned with maintaining a fair balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice. In pursuance of these purposes the New York Attorney General has actively cooperated with the State's Commission on Revision of the Penal Law and Code of Criminal Procedure, and has himself initiated and sponsored legislation aimed at raising the State's standards of criminal justice.[1]

As a prosecuting officer in specified areas of criminal conduct, and as an advisor to the district attorneys of the State and to the State's judicial officers, the New York Attorney General is likewise cognizant of the huge volume of

---

[1] See, *e.g.*, N. Y. Laws of 1965 c. 878, establishing a requirement that every county provide counsel for indigents charged with crime, misdemeanors as well as felonies, and requiring the counties to provide expert, investigative and other services necessary for an adequate defense.

criminal cases handled by the New York courts[1] and of the fact that the questioning of suspects in criminal cases, particularly in cases involving serious felonies, has often been of significant assistance in the solution of crime.

In addition, the New York Attorney General, as counsel to the officers of state correctional institutions who are named as respondents in writs of habeas corpus, is concerned with the seriously disruptive effects upon the administration of justice which would inevitably flow from a retroactive application of new exclusionary rules limiting the admissibility of pre-arraignment statements.

The other Attorneys General subscribing to this brief are charged with similar duties and are equally concerned with these issues. Mindful of the precedents that these cases may establish with regard to pre-arraignment procedures in every State, the States of Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington, West Virginia and Wyoming, the Commonwealth of Puerto Rico, and the Territory of the Virgin Islands join the State of New York in presenting their position in this brief *amici curiae* filed with the Court pursuant to Rule 42.

Questions Presented

Since this brief is not filed in support of either affirmance or reversal of any of the five cases to which it re-

---

[1] For example, in 1963, the Supreme Court and County Courts of New York disposed of the cases of 19,888 criminal defendants charged with felonies and misdemeanors. 10 N. Y. Judicial Conference Ann. Rep. 416 (1965). This figure does not include 452,271 felonies and misdemeanors handled in inferior courts in 1963, nor the several million summary offenses—mostly traffic violations—disposed of in New York every year. 10 N. Y. Judicial Conference Ann. Rep. 204-07, 418-19 (1965).

lates, the questions are stated in general terms, rather than in the factual framework of any of the cases:

1. Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement constitutionally inadmissible at his trial.[1]

2. Whether rules presently or hereafter established within the ambit of the first question should be retroactively applied.

Summary of Argument

I

We oppose the establishment of new constitutional restrictions on the admissibility of pre-arraignment statements made in the absence of counsel. Neither the literal text nor the originally intended meaning of the "Assistance of Counsel" clause of the Sixth Amendment comprehend pre-adjudicatory stages of criminal procedure. Extension of the clause to pre-arraignment proceedings must therefore depend on a showing that such extension is required by developing concepts of fairness beyond the ambit of the original understanding. In fact, no such showing has been made. Therefore the holding of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), should not be made the basis for a general exclusionary rule of constitutional dimension.

---

[1] The five cases present this question under varying attendant circumstances. See note 2, *infra*, page 11. As used in this brief, the term "arraignment" refers to the individual's first appearance before a judicial officer subsequent to his arrest. New York law requires that the magistrate before whom the individual is brought inform him at this time, and before any further proceedings are had, of his right to the assistance of counsel; and that, if he desires counsel but is financially unable to obtain counsel, then counsel will be assigned. See N. Y. Laws of 1965, c. 878, amending N. Y. Code Cr. Proc. §§ 188, 190 and 699.

This Court has repeatedly recognized the importance of pre-arraignment interrogation in the law enforcement process. See, *e.g. Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Empirical evidence now in hand affords no basis for challenging this evaluation. The Court has also recognized the hindrances which would be caused by a general requirement of counsel at the pre-arraignment stage. *Cicenia* v. *LaGay*, 357 U. S. 504, 509-511 (1958). Adoption of the exclusionary rules urged by defendants in these cases would result either in the virtual elimination of pre-arraignment interrogation, or the large scale installation of defense counsel at police stations, or both of these consequences in unpredictable proportions. Empirical evidence justifying such consequences is lacking, and neither professional nor general public concepts of fairness warrant a constitutional requirement of such fundamental changes in pre-arraignment procedures.

Procedural development in this area should take place in non-constitutional terms. State courts and legislatures, and professional organizations such as the American Law Institute, are currently and closely concerned with pre-arraignment procedures, and are alert to the need for mitigating the legal disadvantages of the indigent and uneducated. Progress toward this end, with due regard for the needs of law enforcement, will be surer with the effective participation of these agencies.

II

To whatever extent new exclusionary rules may be established in these cases or may be deemed already established by *Escobedo* v. *Illinois, supra,* such rules should not be given retroactive application. The same considerations which militated against retroactive application of newly established rules barring the admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618 [1964]) and prohibiting adverse comment by a trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v.

Shott, —— U. S. ——, 34 U.S.L. Week 4095 [1965]) weigh heavily against retroactive application of any new rule limiting the admissibility of pre-trial statements which are not shown to have been involuntary.

There can be no doubt but that, at least prior to the decision in *Escobedo* v. *Illinois,* there was considerable and justifiable reliance by the state judicial systems upon this Court's earlier decisions establishing voluntariness as the criterion governing admissibility of a defendant's inculpatory pre-trial statement. See, *e.g., Crooker* v. *California,* 357 U. S. 433 (1958). For this Court to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that state courts and prosecutors should not have used evidence which this Court had previously told them was admissible.

The primary purpose of any new exclusionary rule limiting the admissibility of pre-trial statements would undoubtedly be to prevent police coercion and ensure that an individual's privilege against self-incrimination remains meaningful. Retroactive application would not further this purpose, however—to the extent that an exclusionary rule is an effective deterrent to police misconduct, it is because the police, after the establishment of such a rule, may be expected to act with knowledge of its sanctions. Nor would the policy of protecting the innocent be furthered by retroactive application—to the extent that the absence of counsel may have contributed to the making of an involuntary and hence possibly unreliable statement, relief is already available. See *Reck* v. *Pate,* 367 U. S. 443 (1961); *Fay* v. *Noia,* 372 U. S. 391 (1963). Judicial integrity would be diminished by such an application, since the precedental value of court decisions would be seriously undermined. Retroactive application of new exclusionary rules would not be conducive to the orderly administration of criminal justice either. Numerous old convictions would be reopened and persons convicted of serious crimes, on

reliable evidence of their guilt, would be the principal beneficiaries.

Retroactivity would also be likely to impose serious restraints upon the progressive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final. In addition, retroactive application would impose serious strains on the resources of the bench and bar in all the states, to the detriment of those individuals who have more deserving claims for post-conviction relief and to the detriment of the social interest in meeting pressing problems in other areas of criminal law.

Argument

The first of the two questions to which this brief is primarily addressed is raised in various forms and factual settings in all five of the instant cases, and the second question in No. 762, *Johnson and Cassidy* v. *New Jersey*. Although they are disparate in important respects, the two questions are closely interlocked, in that the reasoning and conclusions adopted for the first may well affect if not govern the answer to the second.

A basic part of our position on both of these questions is the proposition that the constitutional claims asserted in these cases are part of a developmental process rather than an "original understanding".[1] Accordingly, we be-

---

[1] Compare the conflicting approaches to the "original understanding" of the Fourteenth Amendment in Mr. Justice Black's dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68-123 (1947), and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5 (1949). Assuming (in line with Mr. Justice Black's position) "total incorporation" of the Sixth Amendment in the Fourteenth, we think it clear (*infra*, pp. 15-17) that the original understanding of the "Assistance of Counsel" clause did not comprehend the claims asserted here.

lieve that the Court may and urge that it should take full account of contemporary factors in determining whether, when, and how much to expand the constitutional dimension of the right to counsel in the pre-arraignment stage of a proceeding. Our assessment of these factors comprises the main body of this brief.

II

The Court should not presently enlarge the constitutional dimension of pre-arraignment rights to the assistance of counsel.

The constitutional test to be applied in determining the admissibility of confessions was restated by this Court, speaking through Mr. Justice Goldberg, in *Haynes* v. *Washington*, 373 U. S. 503, 513:

> "'[T]he question in each case is whether the defendant's will was overborne at the time he confessed' *Lynum* v. *Illinois*, 372 U. S. 528, 534. 'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.' *Wilson* v. *United States*, 162 U. S. 613, 623. See also *Bram* v. *United States*, 168 U. S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

The application of this test resulted in reversal of the conviction in the *Haynes* case upon the Court's conclusion that the interrogation of the petitioner while under detention for sixteen hours, the denial of his requests for counsel, and the refusal of the police to permit petitioner to telephone his wife until he signed a confession, demonstrated the involuntariness of the confession.[1]

[1] Other recent instances in which this Court has set aside convictions upon determining that the confessions in question did not meet the test of "voluntariness" include *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); and *Spano* v. *New York*, 360 U. S. 315 (1959).

The following year in *Escobedo* v. *Illinois*, 378 U. S. 478, this Court considered the admissibility of a pre-arraignment statement in the context of the Sixth Amendment guarantee of the right to "the assistance of counsel".[1] The scope of that decision has been the subject of numerous and conflicting decisions in both State and Federal courts[2] and extensive discussions in legal periodicals.[3]

---

[1] To whatever extent that case is deemed to establish a "new" rule concerning the admissibility of confessions, a problem of retroactivity is raised, which is discussed in Point II of this brief.

[2] See, *e.g.*, *State* v. *Miranda*, 98 Ariz. 18, 401 P. 2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroncy*, 416 Pa. 331, 206 A. 2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N. W. 2d 764 (1965); *Bean* v. *State*, 398 P. 2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), *cert. denied*, 380 U. S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A. 2d 281, 285 (1964); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 678 (1964), *cert. denied*, 379 U. S. 1005; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964), *cert. denied*, 379 U. S. 1004; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *Commonwealth* v. *Negri*, 213 A. 2d 670, 672 (Pa. 1965); *Commonwealth* v. *McCarthy*, 200 N. E. 2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S. W. 2d 4 (Tenn. 1964); *United States* v. *Cone*, —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965, slip op. p. 3391); *United States* v. *Drummond*, —— F. 2d —— (2d Cir., dec'd Dec. 2, 1965, slip op. p. 3225); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *United States ex rel. Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, 86 S. Ct. 438 (1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *United States ex rel. Walden* v. *Pate*, 350 F. 2d 240 (7th Cir. 1965); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964).

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure in* CRIMINAL JUSTICE IN OUR TIME (U. Va. Press 1965); Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 Boston Univ. L. Rev. 423 (1964); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 Journal of Criminal Law, Criminology and Police Science 156 (1965).

Whatever may in other respects be the verdict of judicial history, we think that *E'scobedo,* and other recent decisions of this Court in the field of criminal procedure, have had a beneficial effect insofar as they have awakened the interest and concern of bench and bar, legislators and executive officials, police and social welfare agencies to current and crucial problems of criminal law enforcement. In the forefront of those whose concern has taken the form of organized study and the formulation of practical proposals are the American Bar Association, the American Law Institute, and the New York Commission on Revision of the Penal Law and Code of Criminal Procedure.

Because the defendant in the *Escobedo* case had already retained a lawyer and had requested opportunity for consultation which the police had denied him, prior to his confession, the case is susceptible of narrow interpretation. Indeed, this Court's own statement of the holding is very particularly worded (378 U. S. at 490):

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S.. at 342, 83 S. Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

We do not suggest that the *Escobedo* case be robbed of principled basis and practical effect by an overly meticulous insistence on its details. But we do read its holding, quoted above, as a warning that substantial variation in circumstances will require fresh consideration of the consequences. And we urge, for the reasons herein set forth, that the present cases should not be the occasion for any substantial expansion of its impact in the constitutional dimension.

These five cases (as well as a sixth to be heard later this term[1]) present a spectrum of questions closely related to those dealt with in the *Escobedo* case. As already indicated, it is not our purpose to seek either affirmance or reversal of any of these cases, for the reason that all five of them involve issues in addition to those of present interest to the *amici curiae*,[2] which may be determinative of their several outcomes.

---

[1] *Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, —— U. S. ——, 86 S. Ct. 438 (Dec. 13, 1965), transferred to appellate docket as No. 815, Oct. Term, 1965 (34 U.S.L. Week 3223).

[2] Thus No. 760, *Vignera* v. *New York*, involves a twenty-four hour period of detention prior to arraignment, from which petitioner projects arguments primarily derived from *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449.

No. 761, *Westover* v. *United States*, likewise involves *McNabb-Mallory* questions, and furthermore is a federal court case, so that statutory and "supervisory" as well as constitutional factors are present. Other unrelated questions (evidentiary and procedural) are also raised.

In No. 762, *Johnson and Cassidy* v. *New Jersey*, petitioners have raised questions pertaining to self-incrimination through comment to the jury, severance, and improper prosecution argument and summation.

In No. 584, *California* v. *Stewart*, and No. 759, *Miranda* v. *Arizona*, in addition to the issues pertaining to the assistance of counsel, there are questions concerning the absence or adequacy of the warning given to the accused that he had a right to remain silent; these questions are likewise present in the *Vignera* case.

Rather, we wish to lay before the Court various considerations bearing on the role of *constitutional* decision-making in this complicated and contentious area. The inclusion in this group of cases of one (No. 761, *Westover* v. *United States*) from the federal judicial system underlines the distinction which, familiar though it may be, merits emphatic reiteration at this time. For in the *Westover* case (assuming that the unrelated evidentiary and procedural questions are not determinative) this Court must take account of federal statutory policy and its own responsibilities for supervision of the federal judicial process, and may find it wise to enunciate general federal rules derived from these sources.

In the other four cases, the Court should, we respectfully submit, give heed both to the limitations of the federal constitutional source and to the enduring impact and comparative inflexibility of constitutional decision-making. Accordingly, in the ensuing text, we invite the Court's attention to the historical content of the "Assistance of Counsel" clause; to the alarming paucity (soon, we hope, to be mitigated) of empirical data pertaining to the role of pre-arraignment interrogation in law enforcement and the probable effect of a general requirement that counsel be present at such interrogation; to the difficulties which courts and bar would encounter in meeting drastic new requirements of universal application; and to the importance of effective participation in the solution of these questions by legislative bodies, professional associations, and other official and private agencies importantly concerned.

A. Elements of the constitutional issue

The manner and extent to which the provisions of the Bill of Rights are "incorporated in" and made applicable to the States by the Fourteenth Amendment remains a matter of dispute within the Court.[1] In our approach to the

issues of these cases we assume, *arguendo,* that the Sixth Amendment guarantee of the right to the assistance of counsel applies in the same manner and with the same force to the States as to the Federal government, i.e., that in constitutional terms the right to counsel is the same under the Sixth and Fourteenth Amendments.[2] So regarded, some of the constitutional issues presented by these petitioners appear to be:

> (a) At what point after the initial contact between a police officer and an individual in which the individual's knowledge of or connection with an actual or suspected crime is discussed does the individual have a constitutional right to the assistance of counsel?
>
> (b) When the right described in (a) arises does the individual have a simultaneous or subsequent constitutional right to be effectively informed of a right to counsel?
>
> (c) When the rights described in (a) and (b) have arisen and if the individual is unable, for financial or other reasons, to obtain counsel for himself, are the arresting authorities, either then or subsequently, constitutionally obligated to provide him with counsel?[3]
>
> (d) Are statements made by an individual, at a time when his rights under (a), (b) or (c) have been violated, constitutionally inadmissible?

---

[1] See the concurring opinion of Mr. Justice Harlan in *Ker* v. *California,* 374 U. S. 23, 44-45 (1963), and his dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 500. *Cf.* Mr. Justice Stewart's remark in *Massiah* v. *United States,* 377 U. S 201, 205: "Here we deal not with a state court conviction but with a federal case, to which the specific guaranty of the Sixth Amendment directly applies.

[2] There may, of course, be additional standards drawn from statutes or from this Court's judicial supervisory powers.

[3] It would appear to be established that the right to retain one's own counsel is at least somewhat more extensive than the right to have counsel supplied. *Chandler* v. *Fretag,* 348 U. S. 3, 9 (1954).

That these rights have attached in a constitutional sense at the time of trial was settled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). That they have attached at the time of any important pre-trial proceeding of a judicial nature is established by *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (arraignment), and *White* v. *Maryland*, 373 U. S. 59 (1963) (preliminary hearing). The issue raised by the present cases is whether they shall now be held to attach in whole or in part at some time prior to arraignment which (as earlier indicated) we use here not in a technical sense but as indicating the accused's first appearance before a judicial officer.

The *Gideon* case did not arise in the context of an exclusionary rule; deprivation of counsel was held to invalidate the entire proceeding. Trials and arraignments that are defective can be held again subject to correction of the errors but of course this is not true of pre-arraignment questioning. So far it has not been seriously suggested that lack of counsel in the pre-arraignment stages should vitiate the entire proceeding and immunize the suspect against prosecution. In contrast to the *Gideon* case, accordingly, the constitutional issues here stirred in the pre-arraignment stages are exclusionary in nature and are to be answered in terms of the admissibility of statements made by the accused during these early stages.

In approaching these issues the State of New York and the other *amici curiae* wish to emphasize their strong support for measures effectively designed to reduce the legal disadvantages which commonly afflict the poor and unsophisticated. There is deep and widespread need for better public education in the structure and detail of individual rights and for the provision of counsel for the indigent.

The question remains how far and in what ways the law in general and Federal Constitutional Law in particular can best contribute to those ends, in the setting of a so-

ciety in which other values, including the speedy apprehension of criminals and safety of the citizenry, also have an important place.

B. Historical factors and established practice

In No. 759, *Miranda* v. *Arizona*, the petitioner observes (Br. p. 11) that in these cases: "We deal . . . with growing law, and look to where we are going by considering where we have been." We think that it is indeed sound to recognize and wise to emphasize that this case does not concern any "original understanding" of the Sixth Amendment's guarantee of the right to assistance of counsel, and that the claims here asserted go far beyond the scope of that clause either as originally intended or as construed and applied during the intervening years.

There is simply no historical basis for the constitutional requirements now suggested, which would exclude all pre-arraignment statements made by a suspect where the state failed to furnish him with counsel. "Text, context and history of the Sixth Amendment lead to the conclusion that the framers were addressing themselves to judicial proceedings, where a person is obliged to defend himself in a process fraught with the technicalities and procedural niceties of the criminal law." *United States* v. *Cone*, —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965; Slip Op. pp. 3391, 3399); see also Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 943-944, 946 (1965).

Shortly after proposing the first ten amendments to the Constitution, the First Congress on April 3, 1790 passed an act providing for the assignment of counsel only in trials for treason and other capital crimes. 1 Stat. 118, Rev. Stat. § 1034, now found in 18 U.S.C. § 3005. If the guarantee of the Sixth Amendment were regarded as imposing a duty on the part of a trial judge to assign counsel to the defendant in all criminal cases, this statutory provision

would have been superfluous. The obvious implication of such a statute was that the First Congress considered the courts to be under no legal obligation to appoint counsel in other than capital cases.

Indeed, as late as 1800, it appears that only in New Jersey by statute, and in Connecticut by practice, did the accused enjoy a full right to retain counsel in a criminal trial, and to have counsel appointed if he were unable to afford it. With the exception of these two states, the right to counsel was interpreted to mean the right of a defendant at a criminal trial to retain counsel of his own choosing and at his own expense. Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 21 (1955). As Judge Friendly has written:

> "History leaves no doubt that the assistance of counsel clause was aimed at the practice that had grown up in England, whereby defendants charged with felonies other than treason could not have the aid of retained counsel at their trials with respect to issues of fact . . . The practice had been even more offensive in America where, in contrast to the mother country, professional prosecutors had to some extent come in vogue. At the time of the adoption of the Constitution, twelve states, as a part of their legal systems, had rejected the English rule. The counsel clause of the sixth amendment was intended to carry this forward; no one was thinking of the assignment of counsel . . ."[1]

Evolving concepts of fairness have made us aware that the assistance of counsel for one's defense is a fundamental right which should not be limited to enjoyment only by those who are rich enough to afford counsel or knowl-

---

[1] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 943-44 (1965). See also Judge Friendly's concurring opinion in *Collins* v. *Beto*, 348 F. 2d 823 at 832, 837 (5th Cir. 1965).

edgeable enough to request it (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]; *Johnson* v. *Zerbst*, 304 U. S. 458 [1937]). However, the purpose of the right to counsel has always been essentially that expressed by Mr. Justice Sutherland in his historic opinion for the Court in *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally, of determining whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon improper evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

This view of the purposes of having the assistance of counsel for one's defense was quoted with approval by the Court in *Gideon, supra,* at 344-45. The present proposals for an extension of the right to a stage prior to the commencement of judicial proceedings obviously envision quite different purposes.

The purposes of such an extension do not relate to guiding an individual through the technicalities of the legal process. Rather, they relate to the fear that an individual's privilege against compulsory self-incrimination and his right to the meaningful assistance of counsel at trial will be lost if counsel is not provided at a period prior to the formal institution of a prosecution, and to a desire to

assure equal treatment for rich and poor. Granted that the protection of these rights is of the utmost importance, the fact remains that other values must also be weighed. The dimensions of the problem were described by Mr. Justice Jackson in his concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) at 61-62:

"I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.

I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

C. The materials of decision

We have stressed the past, not because it provides the answers to the issues raised in these cases, but because it reveals a process and suggests an approach. As the peti-

tioner in *Miranda* rightly stresses, the constitutional right to the assistance of counsel has grown with the years and the times.

In short, the Court can not resolve these issues by seeking the original intention of those who framed the Bill of Rights or by verbal exegesis of the "Assistance of Counsel" clause, and must therefore find the primary material for decision in its appreciation of contemporary standards and circumstances. The temporal flexibility of general constitutional standards was remarked by Mr. Justice McKenna as early as 1910 in *Weems* v. *United States*, 217 U. S. 349, 373:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."

Commenting on this passage nearly half a century later, Chief Justice Warren, in *Trop* v. *Dulles*, 356 U. S. 86 (1958), wrote (at 100-101):

> "The Court recognized in that [the *Weems*] case that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

These considerations apply to the Due Process Clause of the Fourteenth Amendment quite as much as to the Eighth Amendment[1] and their present import, we think, is both plain and of great moment. Since the Court is not here bound by history or verbal logic, the constitutional

---

[1] At a later point in his opinion in the *Weems* case, Mr. Justice McKenna applied these generalizations directly to the Fourteenth Amendment (217 U. S. at 374).

standard may be applied with great flexibility, giving full weight to the bearing of contemporary empirical evidence of the need for and probable effect of the changes here sought.

These changes are not uniformly outlined, but in all these cases the defendants seek the establishment of a rule, to become effective at some point during pre-arraignment interrogation, at which the arrestee must either waive, obtain, or be provided with counsel, on pain of exclusion from evidence of any statement made in the absence of counsel. In No. 761 (*Westover*, Br. p. 34), petitioner would draw that line at the moment of custody; in No. 759 (*Miranda*, Br. p. 30), when interrogation begins; in No. 760 (*Vignera*, Br., pp. 10, 37-38) when the "accusatory" stage has been reached.

Under any of these proposals, it seems clear that the consequences would be:

(a) great reduction or virtual elimination of pre-arraignment interrogation of arrestees; or

(b) provision of counsel on a vast scale for arrestees, most of whom are indigent; or

(c) both (a) and (b) in varying degrees and unpredictable ratios.

We do not suggest that the statement of these consequences establishes them as undesirable. But we do suggest that they are of such a nature that further empirical investigation and analysis are necessary as a basis for general rule-making whether judicial or legislative. As was stated by Mr. Justice Black, dissenting in *Jackson* v. *Denno*, 378 U. S. 368 (1964) at 403 (commenting on the rule there adopted by the Court in line with the suggestions of commentators):

> "None of these commentators appears to have gathered factual data to support his thesis, nor does it

appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience."

D. Available empirical evidence is insufficient for projecting and evaluating the consequences of adopting the exclusionary rules proposed in these cases

The constitutional requirements of fair criminal procedure newly enunciated by this Court in recent years have had their origin by statute or judicial decision in the several states. This Court has, to be sure, given these rules general application by making them of constitutional dimension, but it has not originated the substance of the rules themselves. For example, at the time of *Mapp* v. *Ohio*, 367 U. S. 643 (1963), well over a third of the states had already adopted the exclusionary rule for evidence obtained by unlawful means, and the trend was heavily in that direction.[1] At the time of *Gideon* v. *Wainwright*, *supra*, all but thirteen states had statutes requiring that counsel be provided at trial for the defense of indigent defendants in all felony cases, and in eight of those juris-

---

[1] The rule barring the use at trial of evidence obtained by unreasonable search and seizure was first introduced into American jurisprudence in the State of Iowa (*State* v. *Sheridan*, 96 N. W. 730 [Ia. 1903]), several years before the Court applied the rule to federal courts in *Weeks* v. *United States*, 232 U. S. 283 (1914). After *Weeks*, although Iowa abandoned the rule, eighteen states had voluntarily adopted it by 1949 (see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39). By 1960, with several states having adopted the rule subsequent to *Wolf*, the Court observed that "the movement towards exclusion has been halting but seemingly inexorable" (*Elkins* v. *United States*, 364 U. S. 206 at 219). In holding the rule applicable to the states in 1961, the Court referred directly to the experience of the states, particularly that of California (*Mapp* v. *Ohio*, 367 U. S. 643 at 650-653).

dictions counsel was in fact provided in felony cases.[1] At the time of *Griffin* v. *California,* 380 U. S. 609 (1965), all but six states barred comment upon a defendant's failure to testify at trial.[2]

In all these situations, accordingly, the probable consequences of the new constitutional rule were not a matter of speculation, for the rules were already in force on a non-constitutional basis in a large number of jurisdictions. This does not, of course, mean that debate over the merits of these rules had been stilled or that evaluation of their consequences was uniform. It was, however, clear prior to the constitutional decisions rendered in this Court that the substantive rules they embodied had already proved not only tolerable but preferable to their alternatives in many or most of the states, and the practical workings of the rules could thus be observed in the laboratories which the state and local systems furnished.

But such is not the case with the exclusionary rules proposed in the present cases. Only three states, to our knowledge, have adopted rules conditioning the admissibility of pre-arraignment statements on prior warnings to the defendant of his rights to remain silent and to consult counsel, and in these three states the rule is of very recent origin.[3] No state, so far as we know, has as yet established a system for the mandatory and universal provision of counsel for the indigent at the pre-arraignment stage.

---

[1] See Brief for Petitioner in *Gideon* v. *Wainwright,* 372 U. S. 335, No. 155 Oct. Term 1962, p. 29; *cf.* Kamisar, *Equal Justice in the Gatchouses and Mansions of American Criminal Procedure, in* CRIMINAL JUSTICE IN OUR TIME, p. 92 n. 262 (U. Va. Press 1965).

[2] See *Tehan* v. *Shott,,* —— U. S. ——, 34 U.S.L. Week 4095 at 4098 (January 19, 1966).

[3] See *People* v. *Dorado,* 398 P. 2d 361 (Calif. 1965); *People* v. *Neely,* 398 P. 2d 482 (Oregon 1965); *State* v. *Dufour,* 206 A. 2d 82 (R. I. 1965). In addition, the Pennsylvania Supreme Court has stated (*Commonwealth* v. *Negri,* 213 A. 2d 670, 672 [1965])

(Footnote continued on following page)

Since in these cases, therefore, empirical evidence of the consequences of the proposed rules based on experience from their actual operation is altogether lacking, it would seem especially important to seek evidence from other sources. One would want to know, if only in part, the answer to questions such as the following:

(a) How important is pre-arraignment questioning in the identification and apprehension of those subsequently convicted of crime?

(b) How important are pre-arraignment statements as evidence for the conviction of those accused?

(c) What would be the effect on the interrogation process of (1) previous warning of the right to remain silent; (2) previous informing of the right to assistance of counsel; (3) a requirement that counsel either be waived or be present?

(d) How, in practice, would counsel be made available at the pre-arraignment stage?

This kind of empirical data can, in fact, be obtained, and would be of great value, particularly if studied in relation to available evidence on the effectiveness of alternative means of achieving the same goals. The techniques of the social sciences have already proven to be of considerable assistance in developing a body of usable knowledge in other areas of the law, and in stimulating invaluable reform in those areas. The statistical studies of the Man-

---

(Footnote continued from preceding page)
that that state would follow the ruling of the Third Circuit Court of Appeals in *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (1965), where such a warning was held to be required, until further word from this Court. The State of Texas has long provided by statute (Tex. Code Cr. Proc. Art. 727), that a defendant's confession is excludable where he had not previously been warned of his right to remain silent; however, if the confession leads to confirming evidence both these "fruits" and the confession itself are admissible.

hattan Bail Project,[1] for example, have undoubtedly been greatly responsible for awakening the interest of both the bar and the public in thoroughgoing bail reform.[2]

But although empirical data bearing on the questions listed above may be obtainable, it has not as yet been obtained, at least in sufficient quantities to support a presumably enduring constitutional decision of nationwide application. We detail below several of the areas where both present facts and future prospects remain murky.

(1) *The importance of pre-arraignment questioning in law enforcement*

Police and prosecutorial authorities generally regard opportunity for sustained questioning of arrested suspects as essential for the maintenance of tolerable standards of efficiency in the apprehension and conviction of criminals. The validity of this view has been accepted and enunciated in various opinions and at various times by a number of the members of this Court, and on at least two occasions has commanded a majority. *Haynes* v. *Washington,* 373 U. S. 503, 515 (1963); *Crooker* v. *California,* 357 U. S. 433 (1958) at 440-441, in which the opinion of the Court remarks that elimination of police questioning would have a "devastating effect on law enforcement." See also *Cicenia* v. *Lagay,* 357 U. S. 504 at 509 (1958).[3]

---

[1] See Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U.L. Rev. 67 (1963); Wald, *Pretrial Detention and Ultimate Freedom,* 39 N.Y.U.L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U.L. Rev. 641 (1964).

[2] See generally *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice* (1965), esp. pp. xiii-xxxii (Interim Report, Apr. 1965) and pp. 6-17 (Address of Chief Justice Warren to the Opening Session of the Conference, May 27, 1964); *cf.* Paulsen, *Pre-Trial Release in the United States,* 66 Col. L. Rev. 109, 116-119, 122-125 (1966).

[3] There are other significant comments on the matter by members of this Court. See, *e.g.,* Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana,* 338 U. S. 49 (1949) at 58, and Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut,* 367 U. S. 568 (1961) at 578-580, with citations to much of the voluminous literature on the question.

The authority of the decisions reached in the *Crooker* and *Cicenia* cases was questioned in *Escobedo* (378 U. S. 492), but not on the basis that the *Crooker* opinion's evaluation of police interrogation was unsound. Indeed, those members of the Court who dissented in the *Crooker* and *Cicenia* cases, and those who comprised the majority in the *Escobedo* case, have not based their conclusions on the premise that police interrogation of suspects is of little value in terms of law enforcement.

This favorable evaluation of police questioning has not gone unchallenged in recent months. Perhaps the most conservative recent estimate as to the value of confessions is that of Judge Nathan Sobel, who finds that confessions are used in less than 10 per cent of the criminal trials in Kings County, New York.[1] Judge Sobel's estimate has been sharply contradicted in several quarters, however, notably by New York County District Attorney Frank Hogan, who has noted that a recent study by his staff indicated that admissions had been made by 62 of 91 defendants in pending homicide cases.[2] Mr. Hogan added that "assistant prosecutors told him that 25 of these, or 27%, could not have been indicted at all if there were no confessions."[3]

Without venturing to pass judgment as between any of these estimates, we suggest that the extent to which confessions are used in evidence is not the only value of police interrogation. Often the questioning furnishes leads to other evidence, and no doubt there are many pre-arraignment admissions and confessions which are not offered at

---

[1] N. Y. Law Journal, Nov. 15, 1965, p. 1, col. 6, p. 4, col. 5. Judge Sobel's statistics are based on a survey of the first 1,000 indictments filed in Kings County, New York, subsequent to January 7, 1965. As he acknowledges (*id.* p. 4, col. 5), this is a small sampling; it also gives no hint of the extent to which police questioning may have led to other evidence, or to the immediate release of a suspect.

[2] *N. Y. Herald Tribune*, Dec 2, 1965, p. 31.

[3] *Id.*

the trial because checking their contents led to sufficient independent proof.

Other available statistics indicate that confessions or admissions are made, and used, in quite a high percentage of cases. See, *e.g.*, *Supplementary Memorandum on Behalf of Respondents* in *Linkletter* v. *Walker* and *Angelet* v. *Fay*, Nos. 95 and 581, respectively, Oct. Term 1964 (statistical tables pp. 8-14, summarizing a study of the trial records of the last 100 persons executed for murder in New York prior to 1961, indicate that statements made to the police, after arrest, were introduced in the trials of 85 of those defendants); Barrett, *Police Practices and the Law—From Arrest to Release or Charge,* 50 Calif. L. Rev. 11, 35-44 (1962) (three month study of police performances in two California cities in 1960 showed that between 75 and 90% of all persons charged with crimes had given confessions after what the author terms "surprisingly short" periods of interrogation). The *amicus* brief of the National District Attorneys Association in the present cases presents similar statistics.

Another function of police questioning—perhaps even more important to the effective day to day administration of justice than the solution of a few major crimes—is that of screening cases where an arrest may well have been made upon probable cause but where a decision to charge cannot or should not be made without some further investigation by the police and some evaluation by the prosecutor of the circumstances of the arrest and the availability of admissible evidence. See Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions,* 66 Col. L. Rev. 62, 68-70 (1966); LaFave, ARREST, 319-341 (1965). As Professors Bator and Vorenberg have pointed out, the problem of police questioning must be considered in the context of a going system of law enforcement. Bator and Vorenberg, *supra,* at 69. In any large metropolitan area, a great number of persons will be lawfully arrested for a wide

variety of reasons; routine preliminary questioning may well result in their release prior to the filing of any charge, or in the filing of less serious charges. *Id.*, at 69-70, see also Barrett, *supra*, at 31-35.

The California surveys which are the subject of Dean Barrett's study are particularly illuminating in this regard. They indicate that 28.5% of the persons arrested and booked for felonies in California in 1960 were released without the filing of a complaint; in an additional 21.6% of the cases the felony arrests eventually resulted in the filing of misdemeanor complaints. Barrett, *supra*, at 31-35. To the extent that such preliminary screening can be accomplished without subjecting the individual to coercive interrogation—and the available evidence indicates that coercive interrogation is not at all typical of police questioning[1]—it is obviously desirable both in terms of administrative efficiency and in terms of avoiding the unnecessary stigmatization of a person as one who has been charged with crime.

We recognize, of course, that the utility of police interrogation in law enforcement is not the only factor bearing on the issues presented by these cases. But if competing values must be considered, then it is necessary to have as accurate a gauge of their weight as is possible.

On that score, it must be recognized that our present knowledge is far from complete, as the conflicting estimates cited above amply demonstrate. Nevertheless, it is clear

---

[1] See, *e.g.*, LaFave, *supra*, at 386, where the author observes that

> "In the great majority of in-custody interrogations observed [in the states of Michigan, Wisconsin and Kansas, in 1956 and 1957], the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or to check upon statements already given by the suspect."

that there is a widespread belief among judges, prosecutors, and police officials that interrogation is of *great* importance to law enforcement. Until the contrary appears, therefore, this Court should adhere to the view, expressed in Mr. Justice Goldberg's opinion in *Haynes* v. *Washington, supra,* that (373 U. S. at 515): "Such questioning is undoubtedly an essential tool in law enforcement."

(2) *Effect of the presence of counsel on pre-arraignment interrogation*

Assuming (as one must in the present state of knowledge) that police questioning is an essential part of law enforcement, the next question generated by these cases goes to the effect on the interrogation process of the warning admonitions with respect to constitutional rights and, more important, of the actual presence of counsel during the course of interrogation.

Lack of knowledge on this point is openly acknowledged in the petitioner's brief in No. 759 (*Miranda*) wherein it is stated (Br. p. 45) that: "As a practical matter, we cannot know with assurance whether amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions." We earnestly suggest that some knowledge of this matter is vital for enlightened decision-making, particularly of constitutional dimension.

Members of this Court have addressed themselves to this point on several occasions. In *Cicenia* v. *Lagay, supra,* Mr. Justice Harlan, speaking for a majority of the Court, expressed the view (357 U. S. at 509) that consultation with counsel in the course of pre-arraignment interrogation "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." Mr. Justice Frankfurter, writing in the *Culombe* case, *supra,* was more categorical (367 U. S. at 580): "Legal counsel for the suspect will generally prove

a thorough obstruction to the investigation." No doubt many lawyers would readily accept Mr. Justice Jackson's analysis of the consequences in his concurring opinion in *Watts* v. *Indiana, supra,* 338 U. S. at 59:

> "To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

To be sure, as Mr. Justice Goldberg pointed out in the *Escoboedo* case (378 U. S. at 488), this point "cuts two ways", inasmuch as it highlights the suspect's need of counsel at the same time that it emphasizes the importance to the police of an atmosphere conducive to communication. Analysis of the conflicting considerations implicit in this comparison takes us beyond the empirical problem. Once again, we do not suggest that police efficiency is the only goal of criminal procedure. But in resolving these issues, precision in weighing the individual factors is desirable.

It may be that consultation with counsel would prove to be less of an obstacle to police interrogation than has been generally assumed. But for such a possibility there is at present no significant empirical evidence, and this lack carries its own warning of caution in the enunciation of new constitutional requirements.

A further problem, closely related to the one directly in view, is that the response of the bar to a general requirement of counsel in the pre-arraignment stages cannot be accurately forecast. We agree with the petitioner in No. 759 (*Miranda,* Br. pp. 38-39) that the cost factor should not be determinative, but we think he is quite wrong in regarding the problem as primarily one of cost.

Legal services are, after all, professional services, and shortages of qualified professional services cannot be immediately rectified with money. There is a serious shortage of doctors in this country, quite beyond the reach of prompt cure by the appropriation of public funds.

If, as the petitioner in No. 761 (*Westover,* Br. p. 34) suggests, all jails should be equipped with public defenders, then one must ask who they will be and what will they do. One must ask the same questions if it is anticipated that private lawyers will be subsidized for these purposes.

Assuming that the privilege against self-incrimination is the principal legal element in the interrogation problem, virtually the only function of station-house counsel will be to paste adhesive tape over his new clients' mouths. It is at best dubious whether such a practice would attract the cream of the bar.

Possibly some sort of special training would be necessary to qualify members of the bar for these new pursuits. At all events, it is plain that at present the bar is not equipped, either conceptually or numerically, to cope with the demands which would follow in the wake of the rules proposed by some of the petitioners in these cases.

E. Variety and imprecision of proposals to extend the right to counsel to pre-arraignment interrogation

"There is a tide in the affairs of men," declares the petitioner in No. 759 (*Miranda,* Br. p. 34), "and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused." We think that whatever "it" is might better be described as a tide-rip, in the churning waters of which various and mutually conflicting proposals are being banged against each other. This conflict is most apparent with respect to the proposed point in time at which the right to the assistance of counsel attaches, and to the consequences which are anticipated to flow from recognition of the right.

None of the defendants in the present case proposes that the right should attach prior to taking the accused into custody at the police station, but beyond that point there is little or no agreement. In No. 761 (*Westover*, Br. p. 34), for example, petitioner apparently suggests that the right attaches as soon as the suspect is in custody, though there is also a suggestion that this is not the case until there is "interrogation directed toward eliciting a confession." In the view of counsel for Westover, the consequence will be that a lawyer will be present and available at all jails to represent the interrogated suspects.

The petitioner in No. 759 (*Miranda*) does not advert to this precise question, but his major contention is (Br. p. 11) that "There is a right to counsel for arrested persons when interrogated by the police", and from this it may be inferred that the right accrues when interrogation commences. Apparently it is also his view (Br. pp. 39-49) that interrogation will continue, and that counsel will always be present.

In No. 760 (*Vignera*), the petitioner has attempted to achieve greater precision, utilizing language drawn from the *Escobedo* case, 378 U. S. at 492, and states his test as follows (Br. p. 38):

> "In practice, it would operate as follows: When the proceeding has become accusatory, the police or prosecutor will be obliged to warn the accused of his absolute constitutional right to silence and of his right to consult with counsel *before* talking any further with the police. If the accused thereupon intelligently and effectively waives his right to silence and his right to immediate consultation with counsel, the interrogation can continue. If the accused wishes to consult with previously retained counsel, he will be permitted to do so and the interrogation will not continue while the police are awaiting the lawyer's arrival. If the accused does not already have counsel and is indigent, the

police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point.''

Petitioner in *Vignera* does not share the taste of Westover for jails equipped with lawyers; the ''automatic assignment of counsel at the station house'', he declares (Br. p. 40), would be ''an impractical solution and one which the police are ill-equipped to achieve''. From this and other passages in the brief, it seems clear that counsel for Vignera is prepared to reckon with frequent terminations of interrogations when the ''accusatory'' point is reached.

Inasmuch as in the *Escobedo* case an Assistant State's Attorney was called to help frame and to record the confession (378 U. S. at 483), the Court was warranted in describing the process as ''accusatory'' rather then ''investigatory.'' Yet it seems to us far from clear that the ''accusatory-investigatory'' comparison in *Escobedo* was intended as a test of general application in future cases, rather than merely as a description of the circumstances in the case at hand. The usefulness of the ''accusatory'' test has been recently questioned by the Court of Appeals for the Second Circuit, sitting *en banc,* in *United States* v. *Conc,* ——F. 2d —— (Nov. 22, 1965, slip opinion pp. 3391, at 3398-99):

> ''It has been suggested that the process of questioning suspects may be dissected into 'investigatory' and 'accusatory' phases and that certain legal conclusions, such as whether the Sixth Amendment's right to counsel 'attaches' and requires that the suspect be advised of his rights to silence and counsel, should flow from a judicial finding that police questioning has passed beyond mere investigation. We do not consider this a realistic doctrine for most cases. It was not the job

of the agents questioning Cone, nor were they qualified to make nice decisions about the sufficiency of the evidence they possessed; nor could they at the time of arrest determine what charges should be formally made and against whom. Agents in hot pursuit of those whom they have reason to believe may be implicated in a crime which has just been discovered cannot be required 'on the spot' to decide difficult questions of the sufficiency and quantum of proof.

We think a judicial inquiry into whether the agents were still in the 'investigatory' stage when they arrested Cone, and whether what had started out as an investigation had reached the 'accusatory' stage when Cone was questioned immediately after his arrest, would serve no useful purpose. What may seem to be sufficient evidence at one stage of an investigation may become quite insufficient when those who have supplied information are themselves accused and become unavailable to the government as witnesses, as happened with Moser and Spencer in this very case. To make judicial assessment of the questioning process turn on whether questioning occurred when a case was no longer in the 'investigatory' stage and had entered the 'accusatory' stage would force police officers to make momentary and critical decisions so unrelated to the actualities of law enforcement that the entire police function might well be significantly undermined or demoralized."

It is true that in several recent decisions the "accusatory-investigatory" language of *Escobedo* has been used as a test.[1] Nevertheless, we share the doubts expressed in the Second Circuit. A typical police investigation may involve

---

[1] *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *cf. State* v. *Dufour*, 206 A. 2d 87 (R. I. 1965).

the employment of a large number of detectives simultaneously searching for evidence, pursuing different leads, interviewing witnesses and suspects or possible suspects, and checking out alibis. The discovery of a single piece of evidence might focus suspicion on a single individual at any given point in time, yet not justify regarding him as an accused, particularly where there may not be enough evidence even to justify holding him in custody. Even where the case is a routine one, a determination of when an investigation has reached the accusatorial stage involves judgments which cannot easily be made even by courts acting after the fact, much less by a police officer who may be acting in extremely pressing circumstances.

In *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3rd Cir. 1965), the Court of Appeals for the Third Circuit, in ruling that the interrogation there involved had reached the "accusatory" stage, gave weight (351 F. 2d at 437) to the volume of independent evidence implicating Russo at the time he confessed. Petitioner in *Vignera* (Br. p. 16) endorses this as one of the indicia of the "accusatory" stage.

We find the implications of this troublesome, for it leads to the consequence that good detective work and the accumulation of independent evidence will operate to shorten rather than lengthen the permissible period of "investigatory" interrogation. Ordinarily the police utilize interrogation to confront a suspect with evidence of his implication in the crime, both to see whether he can offer credible exculpatory explanation, and to stimulate admissions if no such explanation can be given. But under the "accusatory" test as applied in the *Russo* case, the police face the prospect that the greater the reason for interrogation of the suspect, the less will be their right to do so, unless counsel is brought into the picture.

We have considered the several proposals and the tests not so much to study their intrinsic merits and demerits,

as to demonstrate their variety and imprecision, and indicate the numerous questions they suggest but do not resolve. These matters are, we believe, highly relevant to the constitutional dimension of these cases, for they argue strongly against "freezing" the pre-arraignment scope of the right to counsel at a time when analysis of the problem is still in its infancy.

F. Importance of non-constitutional decisional sources

In this brief, we have urged that the scope of the right to the assistance of counsel prior to arraignment presents problems which are not ripe for constitutional disposition. In support of this viewpoint, we have sought to draw the Court's attention to a number of aspects of the problem, where, we believe, empirical evidence is insufficient for definitive rule-making, and to the uncertainties still surrounding the specific proposals that have been made to extend the right to counsel into the prearraignment stage.

We would like to close this portion of the brief on an affirmative note, by pointing out that the Constitution is by no means the only tool for the solution of problems of criminal procedure and that legislatures, state courts and professional organizations are currently concerned and actively engaged with pre-arraignment questions including the right to counsel. Nor is the field devoid of ideas and proposals alternative to those urged by petitioners in the present cases.

Public and professional concern with police interrogation centers chiefly on the possibility of abusive, oppressive practices, both physical or psychological, that subject the arrestee to pressures which violate the policy if not the letter of the Fifth Amendment privilege against self-incrimination. Furnishing counsel is one but only one of many means of ensuring that the suspect has an opportu-

nity to make a responsible choice as to whether or not to incriminate himself. There are a wide variety of alternative means by which this goal might be met, including rules barring the use of any confession made to the police; or made to the police during a delay in bringing a suspect before a magistrate; or made by a suspect who has not been warned of his right to remain silent; or made after the suspect has been denied a requested opportunity to consult family or friends or a lawyer; or shown by an evaluation of the "totality of the circumstances" to have been physically or psychologically coerced.

These rules obviously could be employed in combination. Indeed, it appears that the draftsmen of the American Law Institute's proposed Model Code of Criminal Procedure have contemplated an exclusionary rule based on a combination of requirements, including precise time limitations on the length of custody for pre-arraignment questioning; a requirement that a suspect be informed that he is under no obligation to talk; proscriptions against incommunicado detention and against other potentially coercive practices; and a prohibition of any questioning in the absence of counsel once detention has extended beyond a specified period of a few hours, except where there has been an explicit consent to such questioning. See Bator and Vorenberg, *supra,* at 71-76.

We do not suggest that any one of these alternatives is necessarily preferable to the others, or would protect the individual's privilege against compulsory self-incrimination better than would a rule requiring the state to furnish counsel at the stationhouse. We do suggest that the states should have an adequate opportunity to develop alternative methods. It may well be that experience will show that the alternatives provide adequate protection against police coercion, while having a significantly less damaging effect on the detection and prevention of crime.

The complex problems in the area of pre-arraignment procedure[1] are particularly appropriate for solution by legislation rather than by judicial decision. As Judge Kaufman stated in *United States* v. *Drummond*, —— F. 2d —— (2d Cir., Dec. 2, 1965, slip opinion pp. 3425, 3444):

> "... our Constitution guarantees fundamental rights, not the utterance of some judicially-ordained shibboleth. A decision based on constitutional fiat, therefore, is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem. This is precisely the sort of question that can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized."

A legislature is not limited by the facts of a particular case, and can deal constructively with the problems of police questioning in the context of the broad range of problems which exist in the pre-arraignment area. Questions of permissible police conduct during questioning of a suspect obviously bear a close relationship to standards for initial stopping, arrest, search, and subsequent detention. A legislature, working within a broader framework, can adjust the interrelated portions of the process without rejecting the ultimate goals sought by the proponents of an exclusionary rule based on the right to counsel. In addition, a legislature can be more specific than a court; the precise language of a statute may provide for more effective guidance than a judicially created rule formulated on the facts of particular cases.

Large-scale scholarly efforts—most significantly the American Bar Association's project on minimum stand-

---

[1] Judge Friendly, remarking upon the complexity of this subject, has noted that the ALI's partial preliminary draft on pre-arraignment procedure spreads over fifty pages. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 930 (1965).

ards of criminal justice and the drafting of a Model Code of Pre-Arraignment Procedure by the American Law Institute—are underway, and may be expected to provide a basis for constructive action by state legislatures and courts. Even if the states did not all promptly adopt new statutory rules in light of the ALI Model Code, the Code —and its offshoots in the states that used it as a model— would provide valuable guidelines for courts faced with recurring problems in this area. See Friendly, *loc. cit. supra,* at 929.

We do not think the Court need be concerned that the state courts will rest content with old precedents, or ignore the demands of changing times and standards. As we have already noted, in other areas of criminal procedure the Court's new constitutional pronouncements followed state court decisions which, in fact, formed an important part of the basis for this Court's decisions.

The same progressive tendency is manifest among the state courts that have dealt extensively with problems pertaining to the right to counsel. For example, this Court's two most controversial recent decisions—i.e., the *Massiah* and *Escobedo* cases—had previously been anticipated in closely comparable decisions in New York State. In *People* v. *Di Biasi,* 7 N. Y. 2d 544 (1960), the New York Court of Appeals reversed a conviction because, as in the *Massiah* case (1964), the defendant made a statement (received in evidence at his trial) after indictment and in the absence of counsel.[1] In *People* v. *Donovan,* 13 N. Y. 2d 148 (1963), the court reached the same result where, as in *Escobedo* (1964), the defendant, prior to arraignment, had been denied access to his retained counsel.[2]

---

[1] In *People* v. *Meyer,* 11 N. Y. 2d 162 (1962), the same rule was applied to a statement made after arraignment but before indictment.

[2] The *Donovan* case was cited with approval in the *Escobedo* case, 378 U. S. at 486-87.

Very recently, in *People* v. *Gunner*, 15 N. Y. 2d 226 (1965), the court extended pre-arraignment rights to counsel considerably beyond the holding of the *Escobedo* case. In the *Gunner* case, the defendant had made pre-arraignment statements to the police both before and after a lawyer had informed the police that he represented Gunner and wished that no more statements be taken. The conviction was reversed because the statements made after the lawyer's request were received at the trial; two members of the Court would have ruled the earlier statements likewise excludable, because the defendant had not been warned of his rights. See also *People* v. *Friedlander*, 16 N. Y. 2d 48 (1965).

If some other states have not yet had occasion to pursue the questions, or have reaffirmed more limited concepts of the right to counsel, that is still an insufficient reason for this Court to enlarge the constitutional requirements. The opportunity for constructive and varied development is one of the great values of the federal system. To let pass an opportunity such as presently exists for the development by the states of workable rules in this area of strong conflicting values would do great disservice to the principles of federalism and, we suggest, to the healthy development of criminal procedure in the United States.

II

New exclusionary rules limiting the admissibility of pre-arraignment statements should not be applied retroactively.

No. 762, *Johnson and Cassidy* v. *New Jersey*, is a proceeding for post-conviction relief in which petitioners contend that their pre-arraignment incriminatory statements, received in evidence against them at trial, were constitutionally inadmissible under the principles subsequently enunciated in the *Escobedo* case. The Supreme Court of New Jersey affirmed the denial of their applica-

tion, ruling that the *Escobedo* case established new rules of constitutional due process which should not be applied retroactively.[1]

In their brief (at pp. 32-34) in No. 762, the petitioners reject the conclusion below that *Escobedo* established new rules of constitutional law, and contend that the case therefore involves no problem of retroactivity. As *amici curiae,* we express no opinion on that question. Assuming, however, that this Court should agree with the New Jersey court's analysis of *Escobedo*, the problem of retroactivity must then be faced, as it also must in the event new exclusionary rules are to be established in the present or subsequent cases.

The Court has made it clear in two recent cases that not all new constitutional rules must be applied retroactively; rather the merits and demerits of retrospectivity must be weighed with respect to each case, by looking to the nature, purpose, and effect of the new rule, the reliance placed upon the previously existing rule, and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker,* 381 U. S. 618, 628-29, 636 (1965); *Tehan* v. *Shott,* —— U. S. ——, 34 U.S.L. Week 4095, 4096 (Jan. 19, 1966). We submit that an examination of these considerations in the context of an exclusionary rule limiting the admissibility of pre-trial statements makes it amply clear that no such rule should be applied retroactively so as to vitiate a final conviction.

A. The state judicial systems and state law enforcement officials have justifiably placed great reliance on past decisions of this Court establishing voluntariness as the sole criterion for admissibility of a pre-arraignment statement.

There can be no doubt that over the course of years there has been extensive and justifiable reliance by the

---

[1] Other issues, unrelated to those discussed in this brief, are also raised by petitioners in No. 762.

state judicial systems upon this Court's decisions establishing voluntariness as the criterion for determining the admissibility of a pre-trial statement of an accused. Indeed, the Court had specifically held that the introduction of incriminating statements obtained in the absence of counsel—even after the defendant had clearly become the focus of a police investigation and had requested counsel—was no constitutional bar to a valid judgment where the statements were not involuntary. *Crooker* v. *California,* 357 U. S. 443 (1958); see also *Cicenia* v. *Lagay,* 357 U. S. 504 (1957); *Culombe* v. *Connecticut,* 367 U. S. 568, 588-602 (1961); *Brown* v. *Allen,* 344 U. S. 443, 474-476 (1953); *Stroble* v. *California,* 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska,* 342 U. S. 55, 64-68 (1951).

As recently as 1963, the Court reiterated the well established rule that the admissibility of a pre-trial statement depended on its voluntariness, in a case where it held simply that the absence of a warning of a right to silence, delay in arraignment, and lack of opportunity to consult with counsel were factors involved in an assessment of voluntariness. *Haynes* v. *Washington,* 373 U. S. 503, 510-511 (1963). For this Court now to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that the state courts should not have admitted evidence which this Court had plainly told them was admissible. *Cf. Linkletter* v. *Walker, supra* at 637; *Tehan* v. *Shott, supra* at 4096-4098.

The reliance of the police and prosecutors is also significant. A District Attorney naturally prepares his case on the basis of what this Court tells him is the applicable law. At least prior to the decision in *Escobedo,* the only federal constitutional bar to the admissibility of a defendant's pre-arraignment statement was involuntariness—if his statement was voluntary, it was admissible. The police, too, must have relied upon the many decisions holding that the relevant criterion was voluntariness. Certainly they

cannot be said to have been on any kind of notice that they were under any obligation to inform a suspect of a "right" to consult with counsel to be provided by the state. In this respect, the case for non-retroactive application of any new rule governing the admissibility of pre-arraignment statements is far stronger than in the *Linkletter* situation; at least during the period following *Wolf* v. *Colorado*,[1] the police knew (or should have known) they were violating the defendant's constitutional rights when they made the searches later complained of.

Surely it cannot be said that the reliance of the state courts, the prosecutors, and the police upon the past decisions of this Court was wholly misplaced. Yet that would be precisely the effect of a holding that a new exclusionary rule—whether based on a requirement of a warning of a right to silence, or of prompt arraignment, or of informing an accused of a right to consult with counsel, or of any variant thereof—must be applied retroactively.

B. The purposes of a new exclusionary rule would not be served by retroactive application

(1) *Deterrence*

The primary purpose of any exclusionary rule limiting the admissibility of pre-arraignment statements would surely be to deter the police from using coercive methods of interrogation which would violate the policy of the privilege against self-incrimination. *Cf. Escobedo* v. *Illinois*, 378 U. S. 478, 487-90; *Crooker* v. *California*, 357 U. S. 433, 441 (1958); (Douglas, J., dissenting); *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361, 367-369 (1965).

Clearly however, as this Court recognized in the *Linkletter* case, *supra*, at 636-637, the deterrent purpose of an exclusionary rule cannot be served by its application to past trials. It is self-evident that past conduct cannot be deterred; that "ruptured privacy . . . cannot be re-

---

[1] 338 U. S. 25 (1949).

stored''. *Linkletter, supra,* at 637; *Tehan, supra,* at 4098. To the extent that an exclusionary rule serves as an effective deterrent to a particular kind of police conduct it is because the police, after the establishment of such a rule may be expected to act appropriately with knowledge of its sanctions.

(2) *Protection of the innocent*

The Court observed in *Tehan* that—notwithstanding passages in the majority opinion in *Griffin* v. *California* which would indicate the contrary[1]—the rule established by the *Griffin* case did not relate primarily to protecting the innocent against conviction. *Tehan* v. *Shott, supra* at 4098. A new exclusionary rule governing the admissibility of a defendant's statements would in this respect have even less claim to retroactive application than would the rule barring comment.

The danger of convicting the innocent on the basis of his own statements lies in the possibility that physical or psychological coercion might have produced an unreliable statement. To the extent that this is a real possibility, however, retroactive application of a new exclusionary rule is unnecessary. The involuntariness of a defendant's statement has long been grounds for exclusion at trial and for reversal on appeal (see *Brown* v. *Mississippi,* 297 U. S. 278 [1936]; *cf. Bram* v. *United States,* 168 U. S. 532 [1897] and authorities cited therein), and at least where the sate's procedure for testing voluntariness has been found unreliable (see *Jackson* v. *Denno,* 378 U. S. 368 [1964]), post-conviction relief is generally available in the state courts (see *e.g., People* v. *Huntley,* 15 N. Y. 2d 72 [1965]). Moreover, federal habeas corpus is available for a claim of involuntariness; thus, insofar as a delay in arraignment, or the lack of a warning as to a right to silence or to consult a lawyer, may have contributed to the making of an in-

---

[1] See *Griffin* v. *California,* 380 U. S. 609 at 613 (1965).

voluntary statement, relief is available. See, *e.g.*, *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963); *cf.* Brief for Petitioners in *Johnson and Cassidy* v. *New Jersey* (No. 762) pp. 32-34.[1]

(3) *The integrity of the judicial system*

In the *Tehan* decision, the Court emphasized that the complex of values which go into the privilege against self-incrimination relate primarily to preservation of a judicial system in which the guilty are not to be convicted unless the prosecution "shoulder the entire load". *Tehan*, *supra*, at 4098. The Court's finding in *Tehan* that the rule of *Griffin* v. *California*—aimed at protecting the privilege against self-incrimination—should not be held retroactive is obviously relevant in the context of the exclusionary rules now urged upon the Court, all of which also relate primarily to protection of that privilege.

Rather than being in any way furthered by retroactive application, the integrity of the judicial system—in the sense that the system symbolizes a steady and reliable institution—would be seriously undermined by retroactive application of a new exclusionary rule, since a holding of

---

[1] Of course, while federal habeas corpus may always be available for a claim that a statement was based on physical or psychological coercion, the states must be recognized to have a strong interest in limiting the availability of collateral attack in their courts to cases in which, *for good cause*, a constitutional claim was not previously raised. The New Jersey Supreme Court, after noting that petitioners' present allegations with respect to denial of an opportunity to consult counsel and failure to advise of the right to remain silent had not been raised in any prior proceedings—despite antecedent New Jersey decisions holding that these factors are relevant to the issue of voluntariness—held that its prior adjudication of the voluntariness question precluded further consideration of that issue. *State* v. *Johnson*, 206 A. 2d 737 at 740. The Court did not inquire into whether there were exceptional circumstances which would justify the failure to raise these issues earlier in the context of the voluntariness issue—perhaps because the petitions for post-conviction relief did not allege any excuse for this failure. *Cf. Fay* v. *Noia*, 372 U. S. 391 (1963).

retroactivity would necessarily draw into question the value of this Court's decisions as a guide for future conduct. To hold that the reliance of the state courts and state law enforcement officers upon the past decisions of this Court was wholly misplaced would cast doubt upon the precedental value of any new decision in the criminal law field. Predictability is certainly an important value in this area of the law (*cf. Pointer* v. *Texas*, 380 U. S. 700, 411, 413 [Goldberg, J., concurring]), yet that value would be completely rejected by retroactive application of a new rule in this area. Furthermore, the confidence of the public in its legal system surely would not be enhanced by the wholesale release from prison of persons whose guilt of serious crimes is not questioned, on the basis of retroactive application of a new rule which does not relate to the reliability of the conviction.

C. Retroactive application of a new exclusionary rule would place overwhelming burdens on the administration of justice by the states

The opinions of this Court in the *Linkletter* and *Tehan* cases placed heavy emphasis on the fact that retroactive application of the rules at issue in those cases would place great stresses on the administration of justice. The retroactive application of a new exclusionary rule affecting the admissibility of pre-trial statements would, however, place even more severe burdens upon the administration of justice.

(1) ***A great number of cases would have to be reopened, and a large number of persons—particularly those under long sentences, for serious crimes—would inevitably be released from custody***

There can be little doubt but that retroactive application of a new exclusionary rule affecting the use of a defendant's pre-trial statements would result in the reopening of more convictions than would a retroactive application

of the *Mapp* exclusionary rule. What is perhaps even more significant is the fact that such statements, or their fruits, are most apt to have been used in prosecutions for violent, frequently unwitnessed crimes, such as murder, manslaughter, rape, kidnapping and robbery. The individuals convicted of these crimes are the ones who would be most likely to reap the benefits of retroactive application of a new rule in this area.[1]

The pre-trial statements of the defendants were introduced at the trials of 85 of the last 100 persons executed in New York State prior to 1962.[2] It is certainly reasonable to suppose that a similarly high percentage of incriminatory statements was introduced at other trials for serious crimes. Few indeed are the cases in which such statements were made in the presence of counsel or after consultation with counsel. The persons who had been convicted at trials at which such statements were used would, by hypothesis, receive the benefit of retroactive application regardless of the fact that they were convicted fairly under the law as it stood at the time of the trial, despite the reliability of the adjudication of guilt, and irrespective of the voluntariness of their statements.

Application of any new exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted

---

[1] Some idea of the impact upon old convictions of these serious crimes may be gained from the statistics presented to this Court last year by the New York Attorney General and the National District Attorneys Association in connection with the cases involving the retroactivity of the *Mapp* exclusionary rule. See text at p. 25, *supra*. As of June 30, 1964, some 13,869 persons were imprisoned in New York for felony convictions; of these, 4,543 were imprisoned pursuant to convictions had prior to January 1, 1961. Over 50% of those imprisoned for over 3½ years—2,607 of the total, of 4,543—had been convicted of murder, manslaughter, kidnapping, rape or robbery. See Supplementary Memorandum on Behalf of Respondents in *Linkletter* v. *Walker* (No. 95, Oct. Term 1965) and *Angelet* v. *Fay* (No. 578, Oct. Term 1965) at page 4.

[2] Supplementary Memorandum (*supra*, n. 1) at pp. 8-14.

individual who sought to take advantage of the new rule via an application for post-conviction relief. Both on collateral attack and, if that succeeded, upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, and loss of relevant records—would inevitably work to the accused's advantage. See, *e.g.*, *Teham* v. *Shott*, *supra* at 4099; *Linkletter* v. *Walker*, *supra* at 637-638; *United States ex rel. Angelet* v. *Fay*, 381 U. S. 65 (1965); *United States* v. *Sobell*, 314 F. 2d 314, 325 (2d Cir.), cert. denied 374 U. S. 857 (1963); Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 478 (1963). As Judge *Friendly* observed in writing for a unanimous Court in the *Sobell* case, *supra* at 325:

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

(2) *Retroactive application of a new rule would impair the future development of progressive solutions to the difficult problems of criminal procedure*

The recent decisions of this Court with respect to the admissibility of pre-trial statements made in the absence of counsel have been founded substantially on the prior development of similar rules by the state courts, particularly the New York Court of Appeals. See *Massiah* v. *United States*, 377 U. S. 201 at 204-205 (1964) and *Escobedo* v. *Illinois*, 378 U. S. 478 at 486-487 (1964).[1]

---

[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v.

(Footnote continued on following page)

It seems certain, however, that one reason why the state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the newly enunciated rules would affect relatively few past cases—indeed, only those in which the direct appellate process had not yet been exhausted. The New York Court of Appeals, for example, has declined to apply its new rules retroactively.[1] See *People* v. *Howard*, 12 N. Y. 2d 65 (1962), *cert. denied* 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965). Similarly, the California Supreme Court, one of the few state courts which has interpreted the *Escobedo* decision as requiring a warning of a right to consult counsel and to have counsel provided, even in the absence of a request, has declined to apply its new rule retroactively. Compare *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965) with *In re Lopez*, 42 Cal. Reptr. 188, 398 P. 2d 380 (1965).

Significantly, the progressive New York rules were all developed in cases where appropriate and timely objections were made at trial to the use of the statement in question. If collateral attack were to be made broadly

---

(Footnote continued from preceding page)

Rodriguez, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). This Court has also relied heavily on state court decisions in developing the exclusionary rule barring the use at trial of illegally seized evidence. See *Mapp* v. *Ohio*, 367 U. S. 643 at 651-653 (1963).

[1] Significantly, New York has long allowed post-conviction relief for a claim that a conviction was obtained in the absence of counsel. See, *e.g.*, *Matter of Bojinoff* v. *People*, 299 N. Y. 145 (1949). The New York courts thus recognize the great distinction which exists between the case where a defendant has been deprived of the assistance of counsel at trial and the case where a defendant who has had the assistance of counsel at trial later seeks to take advantage of a change in the rules governing the admissibility of evidence. Even though the change may have enlarged the right to counsel at a pre-trial stage, the New York courts will not permit collateral attack in the latter case.

available for claims based on a new exclusionary rule in the confession area, it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as in the *Johnson* case now before the Court (No. 762), a constitutional challenge could later be made on collateral attack.

Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state appellate courts—and perhaps also the federal courts, which would be flooded with applications from federal prisoners (28 U.S.C. § 2255) and state prisoners (28 U.S.C. § 2241)—from engaging in future constructive decision-making in the area of criminal procedure.

(3) Retroactivity of a new exclusionary rule would impair the ability of the state judicial legal systems to provide post-conviction relief for those individuals whose present incarceration truly amounts to "intolerable restraint"

It would certainly seem that under established principles of comity and exhaustion of state remedies, the state courts would be given the first opportunity to consider a claim for post-conviction relief which is based upon a new exclusionary rule. *Cf.* 28 U.S.C. § 2254; *Case* v. *Nebraska*, 381 U. S. 336 (1965). Clearly, however, the retroactive application of a new exclusionary rule would impose tremendous strains upon the bench and bar in all of the states —very possibly to the detriment of the individuals whose claims for post-conviction relief are more deserving under established principles of criminal justice.

The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fairness of the trial process itself, and which

raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright,* 372 U. S. 335 [1963]); the denial of opportunity to appeal (*Griffin* v. *California,* 351 U. S. 12 [1956]; *Eskridge* v. *Washington,* 357 U. S. 214 [1958]; *Douglas* v. *California,* 372 U. S. 356 [1963]); the use of an involuntary confession (*Reck* v. *Pate,* 367 U. S. 443 [1961]; *Fay* v. *Noia,* 372 U. S. 391 [1963]); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno,* 378 U. S. 368 [1964]); the knowing use of perjured testimony (*Mooney* v. *Holohan,* 294 U. S. 103 [1935]); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey,* 261 U. S. 86 [1923]; *Irwin* v. *Dowd,* 359 U. S. 394 [1959]), fall into this category. These are the kinds of cases in which it can truly be said that continued imprisonment is intolerable (*cf. Fay* v. *Noia, supra* at 401-02, 441); where a defendant has really been afforded "no process of law".[2] These are the cases in which the judgment was, in effect, void *ab initio,* and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia, supra,* at 423.

These are the kinds of cases for which many of the states have in the past sought to provide post-conviction relief—and for which, where previous remedies have proven too narrow, the states are now in the process of broadening the remedies under the impetus of the *Noia* decisions. These are the meritorious cases—the ones in which a hearing may well be warranted in order to de-

---

[1] See Brief for Respondent in *Angelet* v. *Fay,* No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker, supra,* at 636 n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 455-460 (1963). See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States,* 1962 Duke L. J. 319, 340-341.

termine both the truth of the charges and the desirability of overlooking a prior failure to raise serious issues of both trial fairness and of reliability—upon which the states should be able to concentrate their resources. Indeed, that is clearly the purpose of the new statutes and court rules which have come into being since the *Noia* decision.[1] To require the states to afford collateral relief in a case where, by contrast, there is no doubt as to the factual reliability of a defendant's statement, where the statement was used at a trial at which the defendant had adequate counsel and at which existing law permitted its use, would be to establish an entirely new and unnecessary concept of collateral relief.

The result, inevitably, would be unending litigation by convicted prisoners, and a wholly unwarranted drain on legal resources—the time of judges, lawyers, court personnel and policemen, as well as public funds—at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive legal developments in other areas of the criminal law.

---

[1] Recent state statutes, court rules and judicial decisions are collected in the concurring opinion of Mr. Justice Brennan in *Case* v. *Nebraska*, 381 U. S. 336 (1965) at 340, 345-346, n. 8. See also Resolution XIV, *Post-Conviction Remedies*, adopted without opposition at the 59th Annual Meeting of the National Association of Attorneys Generals, held July 25-30, 1965. The resolution urges all states which have not yet done so "to adopt, either by statute or rule of court, post-conviction procedures which make it possible to adjudicate all claims of constitutional right properly presented by persons convicted in state court criminal proceedings."

CONCLUSION

For all the foregoing reasons we respectfully submit that the Court, in disposing of these cases, should observe the limiting principles of constitutional review which we have endeavored to set forth.

Dated: New York, New York, February 21, 1966.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
80 Centre Street
New York, New York 10013

Telford Taylor
Special Counsel for the
State of New York

Samuel A. Hirshowitz
First Assistant Attorney General

Barry Mahoney
George D. Zuckerman
Assistant Attorneys General
of Counsel

The following Attorneys General join in the submission of the foregoing brief:

ARIZONA
HON. DARRELL F. SMITH
Attorney General
Phoenix, Arizona

COLORADO
HON. DUKE W. DÚNBAR
Attorney General
Denver, Colorado

DELAWARE
HON. DAVID P. BUCKSON
Attorney General
Wilmington, Delaware

GEORGIA
HON. ARTHUR K. BOLTON
Attorney General
Atlanta, Georgia

FLORIDA
HON. EARL FAIRCLOTH
Attorney General
Tallahassee, Florida

IDAHO
HON. ALLAN G. SHEPARD
Attorney General
Boise, Idaho

ILLINOIS
HON. WILLIAM G. CLARK
Attorney General
Springfield, Illinois

KANSAS
HON. ROBERT C. LONDERHOLM
Attorney General
Topeka, Kansas

KENTUCKY
HON. ROBERT MATTHEWS
Attorney General
Lexington, Kentucky

LOUISIANA
HON. JACK P. F. GREMILLION
Attorney General
Baton Rouge, Louisiana

MAINE
HON. RICHARD J. DUBORD
Attorney General
Augusta, Maine

MARYLAND
HON. THOMAS B. FINAN
Attorney General
Annapolis, Maryland

MISSOURI
HON. NORMAN H. ANDERSON
Attorney General
Jefferson City, Missouri

MONTANA
HON. FORREST H. ANDERSON
Attorney General
Helena, Montana

NEBRASKA
HON. CLARENCE A. H. MEYER
Attorney General
Lincoln, Nebraska

NORTH CAROLINA
HON. T. WADE BRUTON
Attorney General
Raleigh, North Carolina

NORTH DAKOTA
HON. HELGI JOHANNESON
Attorney General
Bismarck, North Dakota

OREGON
HON. ROBERT Y. THORNTON
Attorney General
Salem, Oregon

PENNSYLVANIA
HON. WALTER E. ALESSANDRONI
Attorney General
Harrisburg, Pennsylvania

RHODE ISLAND
HON. J. JOSEPH NUGENT
Attorney General
Providence, Rhode Island

SOUTH CAROLINA
HON. DANIEL R. MCLEOD
Attorney General
Columbia, South Carolina

TEXAS
HON. WAGGONER CARR
Attorney General
Austin, Texas

VIRGINIA
HON. ROBERT Y. BUTTON
Attorney General
Richmond, Virginia

WASHINGTON
HON. JOHN J. O'CONNELL
Attorney General
Olympia, Washington

WEST VIRGINIA
HON. C. DONALD ROBERTSON
Attorney General
Charleston, South Carolina

WYOMING
HON. JOHN F. RAPER
Attorney General
Cheyenne, Wyoming

PUERTO RICO
HON. RAFAEL HERNANDEZ COLON
Attorney General
San Juan, Puerto Rico

VIRGIN ISLANDS
HON. FRANCISCO CORNEIRO
Attorney General
Charlotte Amalie, St. Thomas,
Virgin Islands

(35188)